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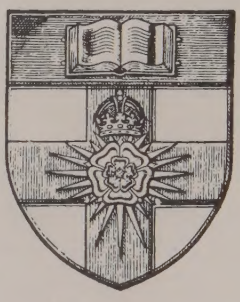

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY, AND MR. JUSTICE LOW.

BERTIE HENRY BALLARD.

1916
* 31 *January.*

On the trial of an indictment with one count for larceny and another for receiving the stolen property the Court of trial must be satisfied that the charge is substantially that of the receiving (and not of larceny) before it admits evidence under s. 19 *of* 34 *&* 35 *Vict. c.* 112, *the Prevention of Crimes Act,* 1871.

The jury must be distinctly directed that there cannot be a conviction for the receiving unless the larceny of the "other property" has been proved to their satisfaction, but there may be such proof without a conviction for such larceny.

Appeal against conviction on matters of law. Appellant was convicted on the 5th January, 1916, at the Essex Quarter Sessions, of feloniously receiving stolen property, and was sentenced to twelve months' imprisonment with hard labour.

C. E. Jones for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was tried on an indictment which charged him with having stolen, on the 4th December, 1915, twelve game fowls, the property of one Hawkins; there was a second count for receiving, and he was convicted on the second count. There was another indictment against him at the same sessions for stealing and receiving, on the 27th November, 1915, three Wyandotte fowls, the property of one Bates. The two charges came from the same petty sessional division, and before the magistrates the appellant had given evidence and called

* The Court (the Lord Chief Justice and Sankey and Low, JJ.) also sat on January 17th.

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31 *January.*

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Reading L.C.J.
Sankey J.
Low J.

witnesses to prove that he had had the game fowls in his possession ever since they were hatched, and had bought the Wyandotte fowls some time before they were supposed to have been stolen. The prosecution therefore knew exactly the issue that would be raised by the defence, namely, the identity of each set of fowls with those that had been stolen. The prosecution, however, tendered in evidence on the charge that was tried the fact that the Wyandotte fowls, which were said to have been stolen, were found in his possession at the same time as the game fowls, and also that he had within five years preceding been convicted of an offence involving dishonesty. This evidence was said to be admissible under s. 19 of the Prevention of Crimes Act, 1871, and *Jones*, 14 Cox C. C. 3 (1877) to be authority that evidence as to the Wyandotte fowls was admissible although they formed the subject of an indictment which had not been tried. The evidence was objected to, and the jury retired while legal arguments were heard, at the end of which the Chairman said that he could not come to the conclusion that the case against the appellant was one of stealing only, and so he felt bound in law to admit the evidence.

I submit that the evidence was wrongly admitted. Practically the only evidence against the appellant on the charge on which he was being tried was the possession of goods that had been recently stolen; this is evidence of the theft; *Bond*, [1906] 2 K. B. 423 (at p. 423); 75 L. J. K. B. 693; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633; and the evidence under discussion was not admissible on a charge of theft, only on a charge of receiving; and then it is only admissible to prove knowledge that the goods were stolen. That was not the issue here; the question was the identity of the fowls. To render the evidence about the other property admissible it must be proved that it had been stolen. Here, although a witness gave evidence that these fowls had been stolen, the appellant denied it on oath, so the matter was not proved. In *Carter*, 12 Q. B. D. 522; 53 L. J. M. C. 96; 50 L. T. 432, 596; 32 W. R. 663; 15 Cox C. C.; 58 J. P. 456 (1884), some one had already been convicted of the theft, and there was no doubt about the identity of the property. When the Prevention of Crimes Act, 1871, was passed the prisoner could not give evidence; there is now a statute enabling him to do so, but with stringent safeguards

1916
31 *January.*

BERTIE HENRY BALLARD.

Reading
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Low J.

against cross-examination to character, except in specific cases. Therefore the power conferred in charges of receiving should be exercised with great caution, and even if evidence is strictly admissible the Court ought to exercise discretion before allowing it to be given.

[The LORD CHIEF JUSTICE referred to *Girod*, 22 T. L. R. 720; 70 J. P. 514: 1906; C. C. R.]

The Chairman's direction to the jury was unsatisfactory. Among other things he said, "You know they were stolen;" this was the very question in dispute. He did, however, end by saying that the whole question was one of identity.

R. Burrows, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The appellant was indicted for stealing, and in a second count for feloniously receiving certain fowls. He was found not guilty on the first count, and guilty on the second. The appeal has been argued on questions of law, which have been stated quite fairly and concisely by Mr. Jones. The points raised are two: first, that evidence was given under the Prevention of Crimes Act, 1871, s. 19, of the finding of other stolen fowls in the appellant's possession, and also of a previous conviction within the time limited by the statute, which was not admissible; and secondly, that the Chairman misdirected the jury.

The facts can be shortly stated. The appellant was charged in the indictment with and tried for stealing certain game fowls. There was another indictment which was not then the subject of trial, but which was the subject-matter of a charge to be tried at those quarter sessions; in any event, it was not then before the Court; the jury were only trying the charge in respect of the game fowls. The other indictment had reference to Wyandotte fowls. There was evidence, first, that the game fowls had been stolen; secondly, that they had been stolen very recently, within a few hours of their discovery; and thirdly, that they were found in the possession of the appellant. Now that was some evidence that these fowls had been stolen, and recently stolen, and that the appellant had received them with the knowledge that

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Reading L.C.J.

they had been stolen. On that part of the case it is said, first, that there had been no conviction for stealing these fowls. That is true; but there was some evidence of the theft and of their identity. Thereupon evidence was tendered that certain other stolen property, namely, Wyandotte fowls, were found in the possession of the appellant. That evidence was tendered under s. 19 of the Prevention of Crimes Act, 1871, the material words of which are, "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months." But objection was raised at the trial, and here, that there was no proof that the Wyandotte fowls were in fact stolen; and that there was only an allegation that they were stolen, and it is said that that is not sufficient. It is urged that great care should be exercised in the recourse which is had to this section, and the Court agrees with Mr. Jones in that view. According to the common law at the time the Act was passed, on a charge of receiving, evidence could not be given of finding in the prisoner's possession other goods in respect of which he was not then charged. But Parliament in 1871 thought right that in these cases of receiving stolen goods, evidence should be admitted which would not otherwise have been admissible. No doubt that was because in many cases there was not sufficient evidence of guilty knowledge. In those days a prisoner could not give evidence. Parliament said, "Where you find a man in possession of stolen property he may be unfortunate, and not guilty, but if you find other stolen property in his possession it may not be easy to believe that it is merely a coincidence." The section has to be carefully administered, no doubt, and ought not to be used where there are counts for both stealing and receiving for the purpose of getting a verdict on the count for stealing, where the court cannot exclude the evidence as there is a count for receiving; it might induce the jury to convict of stealing on very slight evidence. So if the charge is substantially one of stealing, and not receiving, the evidence ought not to be given.

In this case that point was pressed, but the Chairman held that he could not say that the substantial charge was one of stealing, so he felt bound in law to admit the evidence. The Court thinks

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31 *January.*

BERTIE HENRY BALLARD.

Reading L.C.J.

that he was right in that view. The jury found the prisoner guilty of receiving only, and we think the point argued that there must be something more than evidence that property which is not the subject of the indictment was stolen is not really sound in law. If there is evidence that the property was stolen it has to be tendered before the defence has to give an answer. It is impossible for the court to say what answer is going to be made. The point was discussed in *Girod;* it is not necessary to examine that case with any care. The Court quashed the conviction because the evidence was admitted without any evidence that the property had been stolen. Here all the requisites of the statute were complied with. Some reference has been made to the evidence of a previous conviction, but there is really nothing to be said on that point; it is covered by the second part of the section. So the first ground of appeal fails.

The second point raised seems to us to be of no substance. The Chairman tried the case with great care, and gave a direction to the jury which, with the exception of one sentence, is quite beyond criticism, and seems to us quite a good summing up in a case of some difficulty. The Chairman took the same view of the section that the Court does. Looking at the whole summing up, it is clear that in the passage that has been made most of some word has been missed out, as it is inconsistent with the rest of the summing up; possibly the passage should read, "If you know they were stolen." One other point ought to be noticed; Mr. Jones said that even if the evidence was admissible, the court in its discretion ought to have excluded it. The difficulty is that if it was admissible there was no ground on which the court could exercise its discretion. The court ought to point out to the jury that they must be satisfied that the property was stolen before they take that evidence into consideration. It was done here by Mr. Jones as well as the Chairman, and also by counsel for the prosecution. So they all knew that the one thing they had to be careful about was that the Wyandotte fowls were only a circumstance to be taken into consideration in dealing with the charge. We think the direction given was quite proper, and therefore the appeal must be dismissed.

Appeal dismissed.

A. L. B. T.

1916
31 *January.*

GEORGE WILLIAMS otherwise RICHARD EMBLETON.

The Court may, proprio motu, *order an appeal against conviction to be argued, though none has been presented.*

Counsel, therefore, on an appeal against sentence should be prepared to deal with the case as a whole.

This was an appeal against sentence, by leave of Rowlatt J. Appellant was convicted on the 5th of January, 1916, at the Dorset Quarter Sessions, of burglariously breaking and entering a dwelling-house with intent to commit a felony therein, namely, larceny, and was sentenced to four years' penal servitude.

Appellant in person. I left prison on the 14th October, 1914, and enlisted on the 28th October in the King's Royal Rifles, in which I had previously served for seven years. The offence was a "drunken Christmas turn out."

[The Lord Chief Justice: We think that this case requires examination on the question of conviction. Was any direction given that it was for the prosecution to prove that the appellant was on the premises for a felonious intent, and that the appellant's explanation must be taken into consideration on this question?]

Randolph Glen. I have only been instructed on the question of sentence; if the question of conviction is to be dealt with I ask that the case should be adjourned.

The Lord Chief Justice: The case will be adjourned for a week (*a*), but we wish it to be understood that when counsel appears before us the Court assumes that he has been instructed on, and is prepared to deal with, all aspects of the case.

A. L. B. T.

(*a*) See p. 11, below.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE SANKEY, AND MR. JUSTICE LOW.

ANON.

1916
7 *February.*

Particulars of misdirection alleged as a ground of appeal should be given in the notice of appeal: 6 *Cr. App. R.* 1.

Application for leave to appeal against conviction for attempting to communicate information which might assist the enemy, and with intent to assist the enemy. Applicant was sentenced to death at the Central Criminal Court on January 19th, after a two days' trial before Darling, Scrutton and Rowlatt JJ.

Curtis Bennett for the applicant, who was present, complained that the judge (Darling J.) had misdirected, and failed to direct, the jury on the question of intent to assist the enemy.

[LAWRENCE J.: Ought not this to have been put in the notice of appeal in this case? Misdirection is alleged without anything to direct our attention to the passages complained of.]

I did not settle the notice of appeal, but particulars ought to have been given.

The LORD CHIEF JUSTICE: It should be borne in mind that the Court should always have particulars of the misdirection complained of; but the Court has a discretion in the matter, and will allow the point to be taken.

Bodkin and *Boyd* for the Crown.

Application dismissed.

Solicitors for the Applicant—*Percy Robinson & Co.*

A. L. B. T.

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE SANKEY, AND MR. JUSTICE LOW.

THOMAS EVANS.

1916
7 *February.*

If on the trial of an indictment with a count for larceny and one for receiving the jury acquit on the former and convict on the latter, and the Court thinks that the evidence would have justified an interchange of these findings, it will quash the conviction.

This was an appeal against conviction and sentence, by leave of the full Court. Appellant was convicted on the 4th January, 1916, at the Warwickshire Sessions, of feloniously receiving stolen property, and was sentenced to five years' hard labour.

Joy for the appellant, who was present. The appellant was indicted for stealing certain money from the person of one Alfred Atkins, and there was a second count for receiving. The Chairman summed up the case as one of larceny, and made no reference to the second count, nor did he give any direction on the law of receiving. The jury, however, returned a verdict of guilty of receiving only. That must mean that they were not satisfied that the charge of larceny had been proved. I submit that the verdict cannot stand; there was no evidence of receiving. Practically the only evidence against the appellant was the possession by him of a King George penny which the prosecutor said had been in his stolen purse, but the identification of the penny by him was by no means satisfactory. This is not a case where the Court can, under s. 5 (2) of the Criminal Appeal Act, substitute a verdict of guilty of larceny on the ground that the jury must have been satisfied of facts which proved the appellant guilty of that offence, because that is the very verdict which the jury

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7 *February.*

THOMAS EVANS.

LAWRENCE J.
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have refused to find, though invited to do so. In *Perkins*, 21 L. J. M. C. 152; 2 Den. C. C. 459; 16 Jur. 481; 5 Cox C. C. 554 (1852), it was held that a principal in the second degree of larceny cannot be convicted as a receiver, so even if the appellant was assisting in the larceny the conviction is bad.

Norris Foster for the Crown. The verdict of the jury must mean that they thought the appellant was working with a gang, although he was not the person who actually stole the money.

A. L. B. T.

A. T. LAWRENCE J.: The appellant, Thomas Evans, was indicted for stealing from the person of one Alfred Atkins the sum of £7 0*s*. 1*d*. in money, and, in a second count, with feloniously receiving the money well knowing it to have been stolen. He was acquitted on the first count, but was convicted on the second. The Chairman of the Warwickshire Sessions summed up the case quite properly as a case of larceny, and does not appear to have dealt at all with the second count, *i.e.*, that charging the appellant with receiving. The jury, however, as I have said, found the appellant guilty on the second count and not on the first count. The Court feel that the evidence against the appellant of stealing the money was very strong, but we are quite unable to say that there was any evidence of receiving. The whole of the evidence pointed to the appellant being guilty, or being one of the persons who were guilty, of the theft of the money, but the jury chose to disregard the summing up of the Chairman and to return a verdict of guilty on the charge of receiving, in support of which no evidence had been adduced. In these circumstances, we must, albeit reluctantly, quash this conviction.

Conviction quashed.

Solicitors for the Appellant—*Philip Baker & Co.*, Birmingham.

G. B.

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Low J.

JOHN HASLAM.

A cross-examination of a defendant directed to place him in the dilemma of confessing that he had been in prison or of committing perjury is a violation of s. 1 (*f*) *of the Criminal Evidence Act,* 1898, *and, in such a case, the jury ought not to be directed to the unsatisfactory nature of his answers.*

Appeal against conviction and sentence.

The appellant, John Haslam, was convicted on January 7th, 1916, before the Deputy-Recorder, at Blackburn Quarter Sessions, of obtaining by means of false pretences food and money from one Margaret Edmundson, with intent to defraud, and of obtaining by means of false pretences money from one John James Almond, with intent to defraud, and was sentenced to three years' penal servitude.

W. H. Aggs for the appellant (under s. 10 of the Criminal Appeal Act), who was present. This appeal should be allowed, and the conviction of the appellant should be quashed. The examination of witnesses for the prosecution consisted largely of leading questions, and the cross-examination of defendant by the counsel for the prosecution was most improper, being apparently an attempt to force from him a confession of previous convictions. The record of the appellant was a bad one, and he had served sentences of imprisonment in the years 1907, 1908, 1914 and 1915, and in others. He was not cross-examined at all in respect of the charges made against him, but all the questions put to him were directed to the way in which he had been employed, or had spent his time, during the periods in which he was in prison. The result was that he was greatly prejudiced in the eyes of the jury.

Roland Oliver for the Crown. I cannot justify the cross-examination. No doubt counsel who appeared for the prosecution at the trial had something in his mind which does not appear on the shorthand note.

A. T. Lawrence J.: In this case the appellant was charged on an indictment containing two counts, the first of which charged him with obtaining by false pretences food and money from one

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Margaret Edmundson, and the second of which charged him with obtaining by false pretences money from one John James Almond. Without founding our decision upon the fact that the pretences alleged were proved (so far as they were proved) by answers procured by leading questions, we are of opinion that this conviction must be quashed. We have come to that conclusion because we are satisfied that when at his trial the appellant offered himself as a witness, questions were put to him in cross-examination which were in flat contradiction to the terms of the Criminal Evidence Act, 1898, s. 1 (f). The effect of that enactment is to forbid a prisoner who is called as a witness on his own behalf being asked, or if asked being required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that with which he is then charged. None of the exceptions to that provision are relevant here, but nevertheless the appellant was subjected to a long cross-examination which put him in the dilemma that he must either commit perjury or admit that he was in prison at the time referred to by counsel. That was a method of cross-examination which is in direct opposition to the provisions of the Act of 1898. Moreover, in his summing up, the Deputy-Recorder directed the jury that in deciding whether the appellant was guilty or not, they were entitled to take into consideration the fact that he had not been able to give satisfactory answers to the questions put to him in cross-examination. For these reasons we think that this conviction must be quashed.

Conviction quashed.

G. B.

GEORGE WILLIAMS OTHERWISE RICHARD EMBLETON (*a*).

Severity of sentence.

Walter Lloyd for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The conviction of the appellant should be quashed, since there was no evidence of felonious

(*a*) See p. 6, above.

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intent on his part. At the time of the commission of the offence with which he was charged he was a private in the Oxford and Bucks Light Infantry. He had been transferred into that regiment without his consent from the King's Royal Rifles, and in consequence felt aggrieved, and wished to obtain his discharge from the army. To effect this purpose he determined to commit an offence of some kind and "get into the hands of the police." On Christmas Day, 1915, he, with another man, broke into 1, Alexandra Terrace, Melcombe Regis, by prising open a window-catch with a bent piece of iron. The men did not steal anything, but sat in the kitchen drinking a bottle of whisky they had brought with them. There was a watch hanging on the dresser, and appellant would have taken it had he intended to commit the felony alleged in the indictment. Before entering the house the appellant threw away his matches, in order, he said in evidence, that he should not be able to get a light, and that it would be clear that he had not broken in for a felonious purpose. On being charged at the police station, the appellant said, "I did it for the purpose of getting out of the army." These circumstances shew an absolute lack of felonious intent on the part of the appellant, at any rate the absence of the intention to commit larceny; that intention having been alleged in the indictment must be proved. See *Pearson*, 4 Cr. App. R. 40 (1910); 74 J. P. 175. But even if the Court takes the view that the conviction must stand, it is submitted that the appellant's sentence is excessive, and should be reduced.

Randolph Glen, for the Crown, was not called upon.

A. T. LAWRENCE J.: The appellant was charged with burglariously breaking and entering a dwelling-house with intent to commit a felony therein. There is no doubt that he and another man did break into the house in question with an implement as like a burglar's jemmy as anything I have ever seen, and the sole question for our determination is whether the appellant acted as he did with intent to commit a felony. The summing up of the Chairman at the trial put this question clearly and fairly before the jury. It is quite true that when the appellant was discovered in the house he had not stolen anything, but in the opinion of the Court it is impossible to say that there was no

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evidence from which the jury could infer felonious intent. Besides, when he was charged by the police officer, he said: "I did it for the purpose of getting out of the army." It is to be observed that to enable him to get his discharge from the army it was essential that he should commit an offence of some kind; and, therefore, if he broke into the house with a perfectly innocent intent, it would not further his purpose in any way. It would be a totally idle thing for him to do. In our opinion it is not possible in the circumstances for us to quash this conviction. The further point, however, has been taken that the sentence pronounced upon the appellant, one of four years' penal servitude, is excessive. The Court takes the view that it is very undesirable to interfere with a sentence pronounced, after due consideration, by a court of competent jurisdiction, except for very compelling reasons; but in this case there are many circumstances, although the appellant undoubtedly has a bad record, which justify the Court in reducing his sentence to one of twelve months' imprisonment with hard labour.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE A. T. LAWRENCE.

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SIDNEY PITMAN.

The reinstatement of an abandoned appeal is entirely at the discretion of the Court.

On January 28th, 1915, applicant was convicted before Avory J., at Gloucester Assizes, of obtaining goods and credit by false pretences, and of conspiring to defraud, and was sentenced to twelve months' imprisonment with hard labour. On January 31st he gave notice of appeal, but on February 5th abandoned his appeal by a formal notice to that effect addressed to the Registrar of the Court of Criminal Appeal.

Roland Oliver made an *ex parte* application to the Court on his behalf. The applicant asks for leave to withdraw his notice of abandonment, and that his appeal should be proceeded with. When he delivered his notice of abandonment he was under the impression that the fact that his friends were unable to assist him financially rendered it impossible for him to continue with his appeal as he desired. He may not have known that his appeal could be supported out of public funds. It is submitted that in these circumstances the Court will allow the notice of abandonment to be withdrawn, on the ground that there was a mistake of fact. This was allowed in *Barker*, 3 Cr. App. R. 283 (1910).

THE LORD CHIEF JUSTICE: The effect of the notice given by the applicant of his desire to abandon his appeal is, by Rule 23 of the Criminal Appeal Rules, 1908, that his appeal must be deemed to have been dismissed by this Court. There is no doubt that this Court has power either to allow the notice of abandonment

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to be withdrawn or to re-open an appeal which has been dismissed. But that power will only be exercised where there are special circumstances which in the view of the Court justify a departure from the ordinary procedure. Here the applicant asks to be allowed to withdraw his notice of abandonment merely on the ground that he thought that his friends would not be able to give him financial assistance, and that in consequence he would not be able to proceed with his appeal, whereas he now finds that his friends can help him. In the opinion of the Court these facts do not constitute such circumstances as would justify the re-opening of the appeal. It must be borne in mind that precautions are taken to bring to the notice of every prisoner that he has a right to appeal against his conviction and sentence, and that he does not require money to enable him to do so. There can be no justification for an accused person abandoning his appeal unless he thinks that there is no ground upon which to appeal, and that it would be useless for him so to do. For these reasons this application must be refused.

Application dismissed.

Solicitors for the Applicant—*Osborn & Osborn.*

G. B.

ROBERT BOVY.

It is not misdirection to inform the jury that there is sufficient corroborative evidence in law, and the judge is not bound to direct them that it is for them to find whether certain evidence constituted corroboration or not.

Severity of sentence for procuring abortion causing death discussed.

Appeal against conviction on law, and application for leave to appeal against sentence.

The appellant, Robert Bovy, was convicted on January 25th, 1916, before Darling J., at the Central Criminal Court, of manslaughter, and was sentenced to three years' penal servitude.

St. John Hutchinson for the appellant. This appeal should be allowed. The appellant was tried, together with a woman named Kennedy, on indictment for the murder of one Emily Shepherd. Upon the direction of the judge at the trial, the jury did not convict either of the prisoners of murder; they

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ROBERT BOVY.

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came, however, to the conclusion that they were both guilty of manslaughter, and returned a verdict to that effect. The deceased girl, Shepherd, had become pregnant by the appellant, and informed him of the fact. He told her that "she must get rid of it." He then asked two other women, Barrington and Tidy, if they knew of anyone who could get the deceased girl "out of trouble." They introduced him to Kennedy, and eventually Kennedy performed an illegal operation upon Shepherd, which resulted in a miscarriage. Shepherd subsequently died as the result of this operation. Barrington and Tidy were tried on January 12th, 1916, on a charge of using instruments with intent to procure a miscarriage, and were sentenced to nine and six months' imprisonment in the second division respectively. On the following day both these women gave evidence against the appellant. They were clearly accomplices, and it is submitted that their evidence was not corroborated (as it should have been) by other independent evidence in some material particular going to the offence itself and implicating the accused. Even assuming that there was corroborative evidence, such evidence was not properly put by the judge to the jury. The judge should have told the jury that in his view there was evidence which might be corroborative, but that whether or not it did constitute corroboration was entirely a matter for them. He should not have ruled that there was corroborative evidence and said nothing further. He referred to *Bloodworth*, 9 Cr. App. R. 80 (1913). It is further submitted that in any event the sentence inflicted on the appellant is, in view of all the facts of the case, excessive.

R. D. Muir, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The question for our consideration in this case is whether or not there was evidence upon which the jury could properly find that the appellant was a party to the illegal operation which caused the death of this unfortunate girl. Evidence was given that he instigated the deceased girl to "get rid" of the baby which would have been born in some five months' time, and that he took part in finding the woman who actually committed the abortion. It is said that the whole of the evidence against him is that of accomplices; that, as there was no corroboration of such testimony, Darling J., who presided at the trial, ought, at the end of the case for the prosecu-

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tion, to have directed the jury to acquit the appellant; and that, as he failed to do so, this Court ought to quash the conviction. That depends on the question whether or not we think, as a matter of law, that there was proper corroboration of the evidence given by the accomplices. It is sufficient for the purposes of this case to say that, in our view, there was independent evidence corroborating the evidence of the accomplices, which in a material particular went to the offence itself, and which implicated the accused. I do not think it is necessary, especially in view of what was said by the House of Lords in *Christie's* case, (1914) A. C. 545; 83 L. J. K. B. 1097; 111 L. T. 220; 78 J. P. 321; 58 S. J. 515; 30 T. L. R. 471; 10 Cr. App. R. 141, to discuss the operation of the rule that the evidence of an accomplice must be corroborated. It is not necessary that we should state again that that is not a rule of law. It is a rule of prudence and discretion which has been laid down by the Courts and followed by judges in order to prevent the conviction of a prisoner upon evidence which might be insufficient—a rule which is directed to ensure a jury being warned that they ought not to rely upon the uncorroborated evidence of an accomplice. That is the extent to which the rule can be applied.

The second point taken by counsel for the appellant is that, assuming that there was sufficient corroborative evidence, Darling J. was wrong in directing the jury to that effect, and it is argued that he should have left to them the question whether or not they should rely on such evidence. Once it is clear that the evidence was admissible in law and that there was no contradiction of the particular passages of the evidence, it follows that there can be no complaint concerning the judge's summing up in this respect. Moreover, a perusal of the whole summing up clearly shews that the judge only meant that he held that there was corroborative evidence as a matter of law. For these reasons we think that the appeal against the conviction must be dismissed.

We are then asked to say that the sentence passed on the appellant of three years' penal servitude is excessive. This is a class of offence in which a severe sentence is the only one possible. It must be borne in mind that the appellant was the instigator of the offence which culminated, though not intentionally on his part, in the death of the deceased girl. It is impossible for the Court to impose a small punishment in the case of offences of

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this character. The Courts must mark their view of these offences, which do not become less frequent as time progresses and may not tend to become less frequent in the future. The sentence imposed in this case cannot be said to be excessive and must be affirmed by this Court.

Appeal dismissed.

Solicitors for Appellant—*J. Hill & Son.*

G. B.

WILLIAM BEAVAN.

The maximum term of preventive detention should not be imposed without specific reason.

Appeal against sentence.

The appellant, William Beavan, was convicted on January 25th, 1916, before the Deputy-Chairman at the County of London Sessions, of larceny, and of being a habitual criminal within the meaning of the Prevention of Crime Act, 1908, and was sentenced to three years' penal servitude and ten years' preventive detention.

The appellant in person.

Blackwell for the Crown.

The LORD CHIEF JUSTICE: The appellant was charged with stealing a purse containing money, and also with being a habitual criminal under the Prevention of Crime Act, 1908. There is no doubt that, as the Deputy-Chairman said when passing sentence, the term of ten years' preventive detention is not one which it is absolutely necessary that the appellant should serve *in toto*. What part of that term he does serve depends entirely upon his conduct in prison. Cases have come before this Court where persons who have been sentenced to terms of preventive detention have got their discharge from prison within a comparatively short time after the commencement of their sentence. But at the same time we must also consider the case from the point of view of the prisoner who does not improve, and does not reform, and who, perhaps, is detained for the full length of his term. The Deputy-Chairman in this case does not seem to

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have acted upon the right principle. Under the statute the minimum sentence of preventive detention is five years and the maximum is ten years. Within these limits it is for the Court to exercise its discretion and decide, having regard to the facts of the case before it, whether it should impose the minimum sentence or a severer sentence, even up to the maximum sentence. The Deputy-Chairman, in passing sentence, used these words: "I see no reason to reduce the term which I must impose upon this occasion from the maximum; you must therefore be detained in preventive detention for ten years." It appears to us from these words that the Deputy-Chairman took the view that once it is necessary in a case to impose a term of preventive detention, it is incumbent upon the Court to pass the maximum sentence, unless special reasons appear for reducing it. That is exactly what the Court said should not be done in *Sullivan*, (1913) 83 L. J. K. B. 298; 110 L. T. 127; 24 Cox C. C. 13; 30 T. L. R. 94; 9 Cr. App. R. 201. In that case I, in the course of my judgment, used this language: "in the opinion of this Court it would be just as wrong to say that this statute is to be interpreted as laying down the rule that five years are to be the term unless there are special circumstances when it may be increased, as that ten years must be the sentence unless there are special circumstances when it may be reduced. Neither of these rules would be correct. They are not the rules laid down by this Court. What this Court says is that in order to arrive at the proper term of years of preventive detention to be imposed, once the court has come to the conclusion that some term should be imposed, because it is for the court to come to that conclusion, what the judge has to determine and take into account in the exercise of his discretion is all the circumstances of the case. He may impose a period of five years: he cannot impose a period exceeding ten years; it is for him to determine, having regard to all the special circumstances of the case before him, what sentence within these limits he will pass." The Deputy-Chairman seems to have acted in direct opposition to this rule, and for that reason we think that we should interfere with this sentence and reduce it from one of ten years' preventive detention to one of five years'

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE ATKIN.

GEORGES CODERE.

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The words "the nature and quality of the act" in the second and third answers of the judges to the House of Lords in M'Naghten's Case (10 *Cl. & Fin. at p.* 210 : 1843) *refer only to the physical character of the act in question, and are not meant to distinguish between its physical and moral aspects.*

Some of the rules in that case discussed.

This was an application for leave to appeal against conviction. Appellant was convicted on the 5th February, 1916, at the Winchester Assizes, before Darling J., of murder, and was sentenced to death.

Foote, K.C. (with him *Bromley Eames*) for the appellant, who was present. The appellant, who is a lieutenant in the 41st Regiment of Canadian Infantry, was convicted of the murder of Sergeant Ozanne, of the 9th Canadian Mounted Rifles, and his appeal is only that the Court should, under s. 5 (4) of the Criminal Appeal Act, quash the sentence and order that he should be kept in custody as a criminal lunatic. Insanity was the only defence raised at the trial.

The appellant's regiment was in November, 1915, quartered at Bramshot, and on the 3rd December the deceased's regiment arrived there; officers of the two regiments met, and there was a conversation with reference to changing Canadian money; the appellant offered to negotiate the exchange. On the following day the appellant received from Ozanne about $1,500 in Canadian money to exchange. On the same morning he went to a local bank and cashed cheques for £60 and £90 on a London bank at which he had an account, but the amount to his credit there at the

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time was only £5 or £6; it was agreed that he would give the local bank the business of changing the Canadian money. The next day, which was a Sunday, the appellant went to London with Lieut. Morin, an officer in the same regiment, and told him that he was going to kill a man, and offered him money if he would help. Morin answered, "Sure, of course," because he considered the appellant, who was known in the regiment as "*Fou* Codère," as not responsible; he told him to stop fooling. The appellant told him that he was going to wrap the deceased man in a blanket, and was going to arrange with Sergeant Martin for the burial.

On the Monday the appellant changed the Canadian notes for £282 at Cook's office. In the evening he met Sergeant Martin, of the same regiment, told him he was going to make a man disappear, and asked his assistance, for which he offered him £50. He wished Martin at an arranged signal to knock the man on the head with a "cravache," an officer's weighted trench stick. Martin said, "Would it not be better not to shed blood, but to try poison?" The appellant said, "What poison?" and Martin said "Serum anti-tuberculin," and at the appellant's request wrote the name in his pocket-book. The appellant tried without success to obtain this at one chemist's the next morning, and did obtain something from another chemist. He returned to the camp, and under compulsion paid £150 to the bank. He met Martin, shewed him a bottle of stuff, and asked if it was enough; Martin said it was enough to kill a whole regiment. His view really was that it could be drunk with impunity, and it is evident that he thought he was humouring a lunatic. On the Wednesday, at 4 p.m., the appellant drove with a non-commissioned officer, who was no doubt the deceased, to Arundel House, a house about two miles off, at which the colonel and the major of the regiment lived, and at which the appellant had the use of a room. He got some whiskey from the kitchen, and was seen to put some white stuff into it; he went with it into the smoking-room, where the murder was committed. He told the two servants, Keller and Desjardins, that he had killed a man. Keller, who was a heavy, stupid young man, helped the appellant to clean up the blood in the smoking-room and passage, and to put the body, wrapped in a blanket, in the stable. Desjardins said he thought he was going to faint, and left the house. At 5.30 the colonel and major returned; the

major's suspicions were aroused by Keller's state of excitement, but he assumed he had been drinking; the appellant exhibited no emotion. The three officers dined together, waited on by Keller; he said that as long as the appellant was in the house he was afraid to say anything, and it was only the next morning, when it was found that he had not slept in the house, that information was given to the colonel and major, and steps taken to arrest the appellant.

In the meantime the appellant went to see Martin, told him that he had done it, and asked him to get a box to fetch something away in. Martin said he would do it the next morning, and he did in fact then get a very large packing case. He said that he did not believe there was a dead body, but he felt bound to obey his superior officer. Keller was arrested on the 9th December, and on the 11th the appellant wrote a letter which he desired should be given to Keller, in which he said, "The thing has been discovered, and someone saw you strike him. . . . As you have been seen to strike him it is no use to put the thing on me, because I shall not be able to help you if you put me in a hole. While I was upstairs scuffling commenced; having struck you, you struck him in revenge. The only thing to do is to write a confession on paper, and that Lieut. Codere had nothing to do with it. . . . Don't forget to say that all you said before was false, and that it was to defend yourself." This letter was strongly relied on by the prosecution, and no doubt the appellant knew that what he had done was punishable, but the letter is so abnormal that it tells at least as much in his favour on this issue as against him.

The appellant had held a commission in the Canadian militia for two years before the war; he had come to England with the first contingent, but had been sent back to Canada for some reason unknown. Evidence was given that he was quite abnormal mentally, and was not regarded as being responsible for his actions; that he could not carry on a sustained conversation. The major said that he never intended to take him to France, as he was unable to handle men from the moral or mental point of view. The extreme ferocity of the murder was another indication of his mental state; the deceased's head had been smashed, his throat cut nearly to the spine, and forty-five cuts inflicted on the face. The judge said that this was to avoid identification, but the de-

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ceased was wearing uniform which indicated his rank and regiment, and if a sergeant of that regiment were missing that would be sufficient identification. Not only did the appellant shew no emotion at dinner, or when speaking to Martin, but evidence was given that he slept soundly on the night of the murder. Evidence was also given that his father's sister had been insane, and that several cousins on his mother's side had also been insane; that he had been sent away from an agricultural college in Canada as he was not thought to be *compos mentis*. Dr. Stoddart, who had three interviews with him before trial, found him boastful and subject to delusions, and came to the conclusion that he was not of sound mind, but Dr. Craig, who was called for the prosecution, said that, although he could not class him as an absolutely normal person, he thought he knew the difference between a right and wrong act, and could not be certified as insane.

It is conceded that the prisoner must have known that the act he committed was punishable by law, but this is not enough to shew that he was sane. The rules in *M'Naghten's* case, 4 St. Tr. N. S. 847; 10 Cl. & F. 200; 1 C. & K. 130; 8 Eng. R. 718; 8 Scott, N. R. 595 (1843), lay down (Cl. & F. 210) that to establish a defence on the ground of insanity, it must be proved that the accused did not know "the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." "Nature" of the act refers to its physical aspect; "quality" to its moral aspect. It may be that "quality" refers to its criminal or non-criminal nature; but it is impossible to understand the word "wrong" in that sense. The answer of the judges in *M'Naghten's* case, just cited, goes on to say, "If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable." The words "an act which he ought not to do" are here used as a paraphrase for "an act which is wrong"; and the whole sentence therefore demonstrates that "wrong" and "punishable by or contrary to law" are not synonymous, but express two different things (see Stephen, Hist. Cr. Law, ii. p. 163).

The meaning of the word "wrong" was not, it is submitted, explained to the jury; and this Court need not, therefore, be oppressed by their finding. The same may be said of the words "know" and "quality." "Know" must mean, or include, the

power of forming a rational judgment on the quality of his act. To say that a man knows the quality of his act, and knows that it is wrong, simply because he knows that the law will punish him for doing it, is to ignore the effect of the answers in *M'Naghten's* case, taken as a whole.

[The LORD CHIEF JUSTICE: By what standard do you suggest that the accused should be regarded as judging whether his act was wrong ?]

Probably by the standard which he believes is that of the majority of reasonable men. I do not mean his own standard; and if I have made that suggestion, I withdraw it. I mean that it would probably be sufficient to render him punishable, if he knew —that is, understood and appreciated—that the act would be condemned and regarded as wrong by his fellow-creatures. Having regard to the evidence in this case, which shews that the prisoner openly declared his intention of committing the act to Lieut. Morin and Sergt. Martin, apparently without considering it possible that they would interfere or even disapprove, it is manifest that he did not know he was going to do wrong in the sense suggested. The prisoner's conduct after the murder, as narrated by the witnesses Keller, Desjardins, and Martin, points to the same conclusion.

Whether or not a criminal is insane in the sense suggested, is entirely a question of degree; and it may be that the question for the jury, or for this Court, is in fact whether he is so sane that it is right to carry out the capital sentence. If the criminal is incapable of reasonably understanding the heinousness of his act, he does not know that the act is wrong, in the true sense of those words.

Clavell Salter, K.C., and *S. H. Emanuel*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of the wilful murder of Sergeant Ozanne, and his application to this Court is for leave to appeal against his conviction, which, following the usual practice, has been treated as a final appeal. There is no doubt that the appellant did kill Ozanne; that was not in dispute at the trial. The facts, so far as it is necessary to

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recapitulate them after the analysis laid before us by Mr. Foote, may be briefly stated. The appellant was a lieutenant in the Canadian militia for eighteen months or two years before the war. After the war broke out he came to this country with the Canadian contingent as lieutenant, and in December last his regiment was quartered at Bramshot camp; the appellant was living in a house with the colonel and major of the regiment. On the 3rd December he seems to have induced the bank to cash two cheques for £60 and £90 on the promise that he would bring Canadian currency there to be changed into English money. About that time, at what precise moment is not clear, it appears that Ozanne was in possession of Canadian notes of the value of about $1,500, and discussed the question of changing them at mess, when the appellant was present. Having got the two cheques cashed without having money sufficient to meet them, the appellant was bound to find money to put his account in funds. Ozanne appears to have been taken by him to Arundel House, and there beyond all question to have been put to death by him.

It is said that the evidence shews that the appellant was not a person who ought to be convicted of murder, but that the right verdict should have been that he was guilty of the act charged, but was insane so as not to be responsible according to law for his actions at the time. Mr. Foote has addressed an argument to us based on *M'Naghten's* case, which is the classic authority on the subject, which in substance resolved itself into this, that we must assume that when the law says that the question is whether the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, we must read "nature" to have reference to the physical act, and "quality" to refer to the morality of the act, and that therefore the jury should be asked if he knew he was doing wrong. The argument advanced is that the judge ought to tell the jury that "quality" means, "Did the accused person know that the act was immoral?" and when one stops and asks the meaning of "immoral" we get to the first of the difficulties which faced Mr. Foote.

It is said that "quality" is to be regarded as characterising the moral, as contrasted with the physical, aspect of the deed. The Court cannot agree with that view of the meaning of the

words "nature and quality." The Court is of opinion that in using the language "nature and quality" the judges were only dealing with the physical character of the act, and were not intending to distinguish between the physical and moral aspects of the act. That is the law as it has been laid down by judges in many directions to juries, and as the Court understands it to be at the present time.

We then come to the second branch of the test, namely, if he knew the physical nature of the act did he know that he was doing wrong? Mr. Foote has argued that it is not enough that he knew the act was contrary to law and punishable by law, and that, even if he did know that when killing Ozanne, yet the jury ought to have been told that they must find a special verdict under the Trial of Lunatics Act, 1883, s. 2 (1), unless they came to the conclusion that he knew that the act was morally wrong. The question of the distinction between morally and legally wrong opens wide doors. In a case of this kind, namely, killing, it does not seem debateable that the appellant could have thought that the act was not morally wrong, judged by the ordinary standards, when the act is punishable by law, and is known by him to be punishable by law. It was suggested at one time in the course of the argument that the question should be judged by the standard of the accused, but it is obvious that this proposition is wholly untenable, and would tend to excuse crimes without number, and to weaken the law to an alarming degree. It is conceded now that the standard to be applied is whether according to the ordinary standard adopted by reasonable men the act was right or wrong. There may be cases where it is difficult to decide that question, but that is not the case here. The judges in *M'Naghten's* case, in answering the second and third questions put to them, said, "If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong." That is the accepted test, and applying it in this case there can be no room for doubt; once it is clear that the appellant knew that the act was wrong in law, then he was doing an act which he was conscious he ought not to do, and as it was against the law, it was

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punishable by law; assuming, therefore, that he knew the nature and quality of the act, he was guilty of murder, and was properly convicted.

The difficulty no doubt arises over the words "conscious that the act was one which he ought not to do," but, looking at all the answers in *M'Naghten's* case, it seems that if it is punishable by law it is an act which he ought not to do, and that is the meaning in which the phrase is used in that case. There may be minor cases before a court of summary jurisdiction where that view may be open to doubt, but in cases such as these the true view is what we have just said.

In approaching the facts it is right to say that undoubtedly on the evidence the appellant is possessed of a mind of very inferior quality. He was always known as being abnormal mentally; he was called in Quebec and in the regiment "*Le fou* Codère." Instances were given and statements made in evidence that shew, both from his own want of mental capacity and from his family history, that he cannot be regarded as an ordinary person. On the other hand, evidence was given to shew that he knew quite enough to know the nature and quality of the act, namely, that he was killing a man in order to retain money which it was his duty to hand over to the deceased and which he was not in a position to hand over, at any rate without putting himself in a very serious position. If Ozanne was out of the way, it might appear that he had run away with the money, and unless the crime could be brought home to the appellant it might never have been proved that he had the money. Then he takes Ozanne to the house and kills him, tries to conceal the fact that he is killed, and actually gets the two men to help him to conceal the body. It is true he had spoken to other men in a way which shewed that he viewed very lightly the purpose which he had formed. All of these facts shew that there was evidence which it was proper to leave to the jury that he was conscious of the act he was doing within the rules in *M'Naghten's* case. It was open to the jury to find that he did know, although he was a person of this peculiar type of mind. We are asked on the evidence, and on a summing up which we think was unobjectionable, to say that the verdict was wrong, and that the appellant is insane. We have come to the conclusion that we ought not on this evidence to enter such a verdict. But we think it is a case in which, if in

his discretion the Home Secretary thinks it right to make further investigations, he has opportunities of enquiring into matters which are not before us. Nothing that has been said here is intended to prejudice any view which the Home Secretary may form, but the application to this Court must be dismissed.

Application dismissed.

Solicitors for Appellant—*Charles Russell & Co.*

A. L. B. T.

ELDRED JAMES WOOD.

On the trial of a charge of being a habitual criminal, evidence of the defendant's mode of life after the date of his commission of the crime on which he has been primarily convicted is admissible, but the statutory notice to him of such evidence should be as specific as possible.

Severity of sentence on habitual criminals.

This was an appeal against sentence and an application for leave to appeal against conviction for obtaining money by false pretences (which is not reported here), and as a habitual criminal, and for leave to call further evidence. Appellant was convicted on the 28th January, 1916, at the Birmingham City Sessions, before the Assistant-Recorder, and was sentenced to three years' penal servitude and five years' preventive detention.

D. L. Finnemore for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The second ground given in the statutory notice served on the appellant under the Prevention of Crime Act, 1908, alleged "That having been discharged on licence from prison on the 15th July, 1915, on or about the 1st September, 1915, you recommenced your criminal mode of life." That obviously referred to the primary offence of obtaining money by false pretences, which occurred on the 3rd September. But evidence was given by a detective that after leaving Birmingham, which was later in the year, the appellant appeared to have gone to Worcester and called himself "Cook," and he then referred to offences alleged to have been committed at Worcester, Stourbridge

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and Cheltenham. This evidence was not justified by the notice. *Wilson*, 28 T. L. R. 561; 8 Cr. App. R. 20 (1912); *Fawcett*, 74 J. P. 444; 5 Cr. App. R. 115 (1910); *Neilson*, 30 T. L. R. 125; 9 Cr. App. R. 219 (1913).

I understand that the Court has received a letter from a man who states that he employed the appellant in London between the 3rd October and the 9th November. That is the evidence which it is desired to call.

In passing sentence the Assistant-Recorder said, "I am obliged to pass a very severe sentence; my hands are tied behind my back now; I wish I could make it less." He does not appear, therefore, to have exercised his discretion, as he was not bound to pass a sentence of penal servitude for the primary offence. *Bell*, 30 L. T. R. 645; 10 Cr. App. R. 262 (1914), following *Jones*, 27 T. L. R. 108; 6 Cr. App. R. 1 (1910).

D Grierson for the Crown, who was only called upon with regard to sentence. The Assistant-Recorder may have meant that owing to the nature of the crime and appellant's previous record, he was obliged to pass a severe sentence. The real question for this Court is whether the sentence passed was a proper one. The shortness of the intervals between his releases from prison and the commission of fresh crimes are matters to be taken into consideration. The number of his convictions and the rapidity with which they follow are sufficient to shew that he has reverted to criminal habits: *per* Alverstone L.C.J., *Wilson* and *Marshall*, 8 Cr. App. R. 20 (1912).

The LORD CHIEF JUSTICE: It is said that the appellant in this case was wrongly convicted of being a habitual criminal because paragraph 2 of the statutory notice was not sufficiently explicit. The Court thinks that possibly the paragraph was not happily worded, and those responsible for framing these notices might consider whether they could not make them more specific. Mr. Finnemore says that as the offence of obtaining money by false pretences occurred on the 3rd September, that was all the appellant had to trouble about. At the trial that was not the view that was taken, and the jury found that the appellant had been leading persistently a dishonest or criminal life. It appears now that there was evidence which might have been called that

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he was engaged in a motor garage for some weeks. Nothing in the opinion of the Court justifies the view that no evidence could be given of the life he was leading after the 3rd September.

The last point taken is that the Assistant-Recorder was under a misapprehension in passing sentence. It is true that the language used by him was unfortunate, and it is difficult to know which is the right view to take of its meaning; but the Court is of opinion that whichever view is adopted the sentence must be the same. Assuming that the Assistant-Recorder was wrong in the view he took, it would be for the Court to decide what was the proper sentence. Having regard to the appellant's record, which includes a number of convictions for obtaining money by false pretences and for fraud, the Court has come to the conclusion that the sentence to be imposed must be that which was passed.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE AVORY.

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6 *March.*

FREDERICK GLEED.

The true test of receipt, on a trial for receiving stolen property, is control: **Thomas Smith, *D. & P.* 494 (1855), *followed.***

Appeal against conviction.

The appellant was convicted on January 26th, 1916, at the County of London Sessions, before the Deputy-Chairman, of receiving stolen goods, well knowing them to have been stolen, and was sentenced to eighteen months' imprisonment with hard labour.

H. D. Roome for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of receiving, well knowing it to have been stolen, a cask containing sixty gallons of gin. The gin was stolen by a carman employed by the owners, a firm of distillers. The appellant lived opposite a garage yard. On December 9, 1915, police officers observed the carman drive with a van to the appellant's house, and knock at the door, which was opened by the appellant. After some conversation the carman led his horses across the street and down the garage yard. The appellant followed and helped the carman to lower from the van to the ground a barrel of gin, which was subsequently proved to have been stolen by the carman from his employers. It cannot be disputed that in these circumstances the appellant had joint possession of the barrel sufficient to make him guilty of receiving. It is submitted, however, that the Deputy-Chairman in his summing up did not deal with the case as one of joint possession, but invited the jury to find that the appellant had control over the barrel. He referred to *Wiley*, 2 Denison 37 (1850), and *Crane*, 7 Cr. App. R. 113 (1912).

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Eustace Fulton, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: It is sufficient to say in this case that it has not been argued—and indeed it could not have been—that there was not evidence of joint possession of the gin by the appellant with the carman. The mere fact of their having handled the cask together when lifting it from the van is some evidence of such joint possession. As was pointed out in *Thomas Smith*, Dearsley and P. C. C. 494; 24 L. J. M. C. 135; 1 Jur. (N. S.) 575; 3 W. R. 484; 6 Cox, C. C. 554 (1855), it is not necessary that there should be even manual possession of stolen property for a conviction for receiving such property to be sustained against a prisoner. It is sufficient if the alleged receiver has had control over the stolen goods.

It is said, however, that the matter was not left to the jury quite in the manner in which it should have been. In the view of the Court, the Deputy-Chairman summed the case up very properly, and we do not think that there is any ground for our interfering with the conclusion come to by the jury. The appeal will therefore be dismissed.

Appeal dismissed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SCRUTTON AND MR. JUSTICE ATKIN.

[The Court, composed of these learned Judges, also sat on March 13th.]

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20 *March.*

FREDERICK ASHDOWN.

If one of several persons, tried on the same indictment, is convicted on evidence which the Court thinks insufficient, it will not assume that that defendant was found guilty of acting in concert with other defendants convicted of the offence charged unless the jury were specifically directed on the point of common design.

In a proper case, the Court will express its opinion that another indictment arising out of the same facts as those on which it has quashed a conviction should not be prosecuted.

This was an appeal against conviction by leave of the full Court. Appellant was convicted, on the 11th February, 1916, at the Central Criminal Court, before the Recorder, of feloniously damaging tools, and was sentenced to six months' imprisonment in the second division.

Wells Thatcher for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant and a man named Woods were charged with feloniously damaging a capstan lathe at Woolwich Arsenal, where they were employed; they were both convicted, and the appellant was recommended to mercy. The first ground of appeal is that there was no evidence, except the tainted evidence of his fellow-prisoner, that the appellant took any part in damaging the machine. Woods said that he struck the machine, but no other witness suggested that he was seen to do any injury. It is true that two witnesses for the prosecution, Smith and Jacobs, said that they saw the appellant with his hand lifted holding a bar of steel, though he did not strike with it.

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FREDERICK ASHDOWN.

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The explanation given by the appellant is that he had a spanner in his hand, and I suggest that this was a mistake on the part of the witnesses. He was standing at the spot where it was proper for him to stand.

The second ground of appeal is that the question whether he was acting in concert with Woods was never left to the jury. The Recorder merely asked the jury whether the appellant did not injure the tools; he said, "Did they do what is said in order to spite Tye?" Thus no opportunity was given to the jury of differentiating between the two prisoners; they ought to have been told that they could deal with them separately.

Roland Oliver for the Crown. There was evidence that the appellant did the damage to at least one of the tools. Jacobs and Smith only saw one tool struck, but two were injured. A police officer arrested the appellant for damaging a lathe, to which charge he made no reply. On the way to the police station, he said "I suppose you have got Woods already," and later, "These machines are being smashed through jealousy." Taken in conjunction with the fact that he was seen with a bar of iron aloft in his hand, that was evidence on which he could properly be convicted. As the jury were not directed on the question of acting in concert with Woods, it must be taken that they found he had actually done the damage himself.

Although no direction was given on the second question, the evidence is so clear that the failure should not be fatal; the appellant participated in what was done from beginning to end. The facts in this case are not unlike those in *Rubens*, 2 Cr. App. R. 163 (1909), where two brothers were held to have been rightly convicted of murder, although only one of them struck the fatal blow. It is clear that on a proper direction the jury must have convicted. It is, therefore, a case in which the proviso to s. 4 of the Criminal Appeal Act should be applied.

The LORD CHIEF JUSTICE: The appellant was charged with a man named Woods, who was also convicted, with unlawfully and maliciously damaging with intent to destroy or render useless certain tools, under s. 15 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97). Woods has not appealed. The appellant was with Woods working at Woolwich Arsenal at a capstan, with a lathe next to one Tye. The evidence establishes that it was

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thought that the machine at which Tye was working was better than that at which Woods was working. Tye proved that Woods had asked him on the morning in question to change machines, and the appellant tried to persuade him to do so. In the afternoon Tye left his lathe to fetch a tool, and when he returned a tool called a rose-cutter was broken, and the cutting point was broken off another one called a parting tool. Further, the lathe had been changed from a state of preparation for the first operation to a state of preparation for the second operation. Evidence was given by Smith and Jacobs that the appellant was seen standing by the machine with a bar, weighing from 18 to 20 lb., uplifted as if to strike. One of the witnesses called out to the appellant in remonstrance, with the result that nothing was proved to have been done with the bar. Woods gave evidence, and there is no doubt that he struck the rose-cutter, and he also said that the appellant struck a blow; but the Recorder put the question to the jury in substance, Did the two men deliberately proceed to damage the machine?

It is possible that the jury, on the evidence against the appellant, if they had taken a view adverse to him on the point, might have convicted him of acting in concert with Woods. Woods undoubtedly struck the machine, and the only question was whether he did so accidentally or maliciously, but there was no satisfactory evidence that the appellant had done so. True, Woods gave evidence to that effect, but there was no such evidence given by the witnesses for the prosecution. The evidence of Woods was not quite consistent with that of Smith and Jacobs. The question we have first to consider is, whether there was sufficient evidence in law before the jury of a blow by the appellant. The evidence is not in a very satisfactory state, and we have felt great doubt; but, on the whole, we have come to the conclusion that the advantage of the doubt should be given to the appellant, and that, as it was not satisfactorily established that he struck a blow, we should hold that there was no evidence in law that he took a direct part in smashing the machine.

That leaves the question whether he was acting in concert with Woods in the furtherance of a common design. Undoubtedly there was evidence on which he could have been convicted of this if the jury had been properly directed, but the Recorder treated the case on the footing that both men were charged with com-

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mitting the act, and it was for the jury to consider whether both or one of them struck a blow. No doubt if the appellant stood by and did not interfere, that would not be enough to justify his conviction; but the jury might have been told that they could convict him if he was acting in concert with Woods. Although we do not feel that the case is in a satisfactory condition even at the present moment, we have come to the conclusion that it would be right to give the advantage to the appellant, and therefore the conviction must be quashed. There is a second indictment on the file arising out of the same facts, and the view of the Court is that no further action should be taken upon it.

Conviction quashed.

A. L. B. T.

JOHN JAMES BERWICK.

The Court may quash a conviction on the report of the trial judge that he was not satisfied with it, though it would decline to do so on the further evidence called by appellant.

Where the trial judge had granted a certificate of appeal, but an appeal had previously been entered on grounds other than those disclosed by the certificate, the Court heard argument on the former grounds.

This was an appeal against conviction, on the certificate of the Deputy-Chairman of the County of London Sessions, which was given after the appeal was entered on grounds other than those stated by him. Appellant was convicted, on the 24th February, 1916, of larceny, and was bound over under the Probation Act. There was also an application for leave to call further evidence.

Wickham for the appellant (under s. 10 of the Criminal Appeal Act), who was not in custody. The appellant was tried with one Bailey, who was separately defended and also convicted. The certificate has been granted on the ground that after conviction Bailey made a confession to the probation officer exculpating the appellant, and I ask for the ruling of the Court on a question of procedure. Notice of appeal on the grounds of misdirection was

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lodged on 28th February. It is therein stated that the judge did not grant a certificate. On 14th March the Registrar of this Court gave notice that the Deputy-Chairman had since granted a certificate. Could he do so after this Court was seised of the matter? Moreover, the certificate is only given on the grounds of the confession, and I rely on many misdirections.

Henry William Bailey called and examined by *Wickham*. The appellant did not go to Northedge for a pass for a van on the 21st December; George Tressandern's van-boy got the pass, using the appellant's name. I know that the appellant had nothing to do with the robbery.

Cross-examined by *Oliver* for the Crown. I was away on sick leave on the 21st December. I did not ask anyone to get the pass. I had nothing to do with the use of the appellant's name. I did not say in the statement I made, "I used his name. We knew he was away, and thought no one would suspect." I said, "His name was used because he would not be suspected." That was because I thought he was at work. I did not know that his name was to be used until I got the pass. I had pleaded guilty to stealing whiskey when I made the confession; the appellant had not pleaded guilty to anything else.

By the Court. I had told my counsel I was not guilty; that was untrue. I also gave evidence on oath which was all lies, but I am telling the truth now.

[The LORD CHIEF JUSTICE: The other grounds of appeal which it is desired to argue had better be dealt with.]

Wickham. The Deputy-Chairman misdirected the jury on several matters, and gave the jury no direction on the questions of possession or intent. The stolen tea was never traced to the appellant's possession. He also misdirected himself in law in allowing the case to go to the jury.

R. Oliver for the Crown. There was abundant evidence to justify the conviction, and the jury were properly directed. Evidence was given that the appellant was at the stables on the

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morning in question, and if he was there there is little doubt that he was guilty. The evidence as to an *alibi* was very vague though apparently honest, and the jury were fairly directed on the point.

SCRUTTON J.: This case comes before the Court in peculiar circumstances. The appellant was tried with Bailey for being concerned in the theft of a number of packages of tea worth between £300 and £400, which the prosecution alleged they received in a van from Buchanan's warehouse and made away with. The jury convicted both prisoners. It was obvious that a very serious system of depredations was going on among carmen to a receiver behind, and the Deputy-Chairman said that it might affect Bailey's sentence if he made a statement. Bailey made a statement to the probation officer to the effect that the appellant was not guilty, and he gave certain information whither the property had gone. Meanwhile the appellant had appealed on the ground of misdirection, and the matter came before this Court. On that the Deputy-Chairman, anxious that the appellant should suffer no injustice, gave a certificate and wrote stating that he thought that it was a doubtful conviction, and that there were some matters which he ought to have put more strongly to the jury.

The Court has to consider two matters—firstly, the evidence of Bailey: and secondly, the evidence before the jury, apart from the confession of Bailey. We have approached the evidence of Bailey with great anxiety. He had gone into the witness box, and, though not asked by counsel anything about the tea, had sworn to certain facts which, if true, proved him to be innocent. He did not stop there. His counsel in his presence stated that Bailey had told him that he was not guilty of the theft of the tea, and he again repeated that to counsel for statement to the court. He now comes to us on oath and tells us that all these statements were lies, and he makes a different statement on oath to that which he made to the probation officer. The Court thinks that it is unable to attach any importance to his statement, and that it would be a bad precedent to act on the statement of a man who has so perjured himself. Whether he shall be prosecuted for perjury is a matter for other authorities.

On the other question, Rose, a van-boy, who had been six days in the service of the firm and was out with the appellant on some of these days, said that he had seen the appellant on that day near the

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pay-box. It is obvious that his evidence was not very clear. Secondly, Northedge says that he issued a pass to the appellant, but he admitted that he frequently issued passes to van-boys on behalf of drivers. Thirdly, the appellant's horse was brought back by a man who is said to have been Bailey, but one witness said he thought it was the appellant. He used the vaguest language, and in cross-examination said that he was not sure that it was the appellant. The appellant called a very respectable witness who said that the appellant was at home all that day. After carefully considering the evidence, and in the light of the Deputy-Chairman's view, we think that the case ought not to have been left to the jury against the appellant, the evidence being so slender and contradictory. The conviction will therefore be quashed, but that is done without having any regard to the statement of Bailey.

Conviction quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE AVORY.

[The Court sat on April 3rd, composed of these learned judges, and on April 5th, composed of the two former and Scrutton J.]

NOEL BARNARD TEESDALE MACKINTOSH AND FRANK HUGHES.

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10 *April.*

Severity of sentence.

Whether a period of detention before trial should be taken into account in the sentence is a matter of discretion for the judge in view of all the circumstances.

These were applications for leave to appeal against sentence. Applicants were convicted on the 29th February, 1916, at the Guildford Assizes, before Bray J., of gross indecency with a male person, and were each sentenced to two years' imprisonment with hard labour.

St. John Hutchinson for the applicants, who were not present. The sentences were excessive; the offence was not of so serious a nature as to call for the maximum sentence. Further, the applicants were tried before Lawrence J., at the autumn assize, when the jury disagreed; owing to the difficulty of raising funds to instruct counsel, the second trial was postponed to the next assize. The disagreement of the jury will result in the applicants spending five months more than the maximum period in prison. *Taylor*, 8 Cr. App. R. 26 (1912), is authority that the period in prison awaiting trial should be taken into account.

The LORD CHIEF JUSTICE: This application is based on two grounds; the first is that it was not a case in which the maximum

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NOEL BARNARD TEESDALE MACKINTOSH AND FRANK HUGHES.

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sentence should have been imposed. It is not necessary or desirable to review the facts; it is sufficient to say that it was as bad a case as can be imagined, and not one for which the maximum sentence is too severe. The second ground is that there was an interval between the applicants' arrest and sentence, and that if that period of detention is taken into account the applicants will be detained in prison longer than the two years. They were arrested on the 8th October, and tried on the 6th and 7th December, when the jury disagreed. The judge was ready to re-try the case at the same assize, but at the request of the applicants the trial was postponed to the next assize. They were then tried on the 28th and 29th February and convicted. The first answer to the contention put forward is that, if it prevailed, no sentence of two years could stand; there is always a period of detention before trial; that is a matter for the judge to take into account if he pleases, and is within his discretion. The real ground here, however, is that there was an abortive trial, but that ought not to avail the applicants, because it was only on their evidence, which the jury at the second trial found to be false, that the first jury disagreed. The Court cannot say here that the judge exercised his discretion too harshly, so the applications must be dismissed.

Applications dismissed.

Solicitor for the Applicants—*F. Freke Palmer.*

A. L. B. T.

MABEL ADELAIDE SMITH.

The presumption of coercion in the case of joint crimes committed by a wife in the presence of her husband extends, semble, *to misdemeanours.*

The omission by counsel of taking a point of law does not affect the duty of the judge to call the attention of the jury to it.

This was an application for leave to appeal against conviction. Appellant was convicted on the 10th March, 1916, at the Warwick Assizes, before A. T. Lawrence J., of fraudulent conversion and falsification of accounts, and was sentenced to three months' imprisonment in the second division.

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MABEL ADELAIDE SMITH.

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Ridley J.
Avory J.

Maddocks for the appellant, who was not present. The appellant was tried jointly with her husband, and both prisoners were convicted. The judge misdirected the jury by failing to point out to them that the appellant committed the offences in the presence of her husband, and that therefore the presumption was that she committed them under his coercion.

AVORY J.: The appellant was convicted of conversion of money entrusted to her for a certain purpose, and of falsification of accounts which she kept as a servant of the Post Office. Her husband was the postmaster, and he was convicted with her. The sentences which the learned judge passed shew that he thought that the female prisoner was the real offender, for he only bound the husband over. It has been argued to-day that the judge did not point out to the jury the defence of coercion. A married woman who is alleged to have committed an offence in the presence of her husband is presumed to have acted under his coercion. The principle is that though the mere fact that two persons jointly charged with a crime are married creates no presumption of coercion, yet, as a general rule, the husband's presence does raise a presumption of his coercion and excuses the wife. But this presumption may be rebutted. If it appear that she was principally instrumental, acting voluntarily, and not by coercion (even though the husband was present and concurred), she will be guilty. His mere presence at a crime only raises a *primâ facie* presumption. There was ample evidence here that the appellant was acting independently, and not under coercion; the evidence was slight that the husband was implicated at all. Even if it was the duty of the judge to mention the point of law to the jury —and the Court agrees that the mere fact that counsel for the defence has not taken the point does not affect that duty—it is clear that, on the evidence, the jury would have come to the same conclusion if they had been directed upon the point. Therefore the application fails.

Application dismissed.

Solicitor for the Applicant—*J. R. Phillips*, Stratford-on-Avon.

A. L. B. T.

1916
10 *April.*

Reading
L.C J.
Ridley J.
Avory J

WILLIAM ALBERT WILLIS.

A witness, whose husband has been indicted with defendant and has pleaded guilty (but is not called), is not in the position of an accomplice for purposes of corroboration.

This case distinguished from Neal (7 *C. & P.* 168 (1835), *where the accomplice was called), which was wrongly decided.*

Corroboration at common law *does not involve the statutory qualification that the evidence must implicate accused on some material point. The true rule is to be found in* Wilson *and in* Blatherwick, 6 *Cr. Ap. R.* 125 *and* 288 (1911).

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted on February 25th, 1916, at the County of London Sessions, before the Deputy-Chairman, of feloniously receiving stolen property, and was sentenced to three years' penal servitude.

Huntly Jenkins for the appellant, who was present. The appellant was indicted with three men named Poulton, Brooks and Savage for stealing and receiving twenty-seven chests of tea; the other three prisoners pleaded guilty. The evidence against the appellant was mainly that of Poulton, who had pleaded guilty, Robert Davis, who admitted that he himself had received money over the transaction and knew it to be dishonest, and was therefore also an accomplice, and Mrs. Alice Brooks, the wife of another of the co-prisoners. Her evidence was objected to by the counsel who defended the appellant at the trial, but the Deputy-Chairman held that it was admissible, and added that but for the evidence of Mrs. Brooks he would not have allowed the evidence of Poulton to be considered by the jury. I admit that this puts the matter too high in the appellant's favour, and the Deputy-Chairman corrected himself when he came to sum up; but the jury must be warned when there is no corroboration of an accomplice's evidence. Mrs. Brooks's evidence should have been treated as if it had been given by her husband; she is one with her husband; it was therefore in law the evidence of an accomplice. Her evidence was tainted because of the temptation to affect, if possible, the sentence of her husband.

In *Neal*, 7 C. & P. 168 (1835), Parke J. refused to admit the evidence of the wife of an accomplice.

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WILLIAM ALBERT WILLIS.

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[AVORY J.: That was a case on circuit, and if it is rightly reported, the decision is inconsistent with the general principle that the evidence is admissible, though the jury ought to be cautioned.

RIDLEY J.: That case was decided long before the present rules of evidence came into effect. At that time the parties in a civil case could not give evidence.]

Neal is referred to in *Payne*, 8 Cr. App. R. 171 (1913), where Phillimore J. held that the jury ought to have been warned as to the value of evidence given by the wife of an accomplice. No such warning was given here, so the conviction should be quashed. It is true that Mrs. Brooks was not in fact a party to the theft, and she complained that the stolen property had been brought to her house.

The sentence was excessive for a first conviction.

Roland Oliver, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The appellant was indicted with three other men, Poulton, Brooks and Savage, for stealing and receiving twenty-seven chests of tea. The other three men pleaded guilty; the appellant pleaded not guilty, and was tried. At his trial the prisoner Poulton was one of the witnesses called for the Crown, as also was a man named Davis, who admitted that he had participated in the larceny. Their evidence, although that of accomplices, was undoubtedly admissible, but in such a case the judge is bound to caution the jury that they ought not to act on such evidence unless it is corroborated, and the Deputy-Chairman directed them to that effect. Mrs. Brooks, the wife of the prisoner Brooks who had pleaded guilty, also gave evidence corroborating the evidence of Poulton and Davis. Brooks was not called as a witness. Mrs. Brooks stated in evidence that she was not herself concerned in the theft, that she had protested against the part that her husband was taking in it, and had tried to persuade him to have nothing to do with it. The truth of her statement was not disputed, and it was not suggested that she was herself an accomplice or had acted dishonestly, but it was argued, both at the trial and before this Court, that as she was

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10 *April.*

WILLIAM ALBERT WILLIS.

Reading L.C.J.

the wife of a person who had taken part in the crime, and as husband and wife are one in law, her evidence was only of the same value as if it had been given by Brooks himself. The Deputy-Chairman refused to accept that contention; he thought that her evidence was not to be treated as if it was the evidence of an accomplice, and that the mere fact that she was the wife of a man who had taken part in the offence did not impose on the judge a duty to caution the jury against acting on her evidence unless it was itself corroborated.

On behalf of the appellant, reliance was placed on a passage in Archbold's Criminal Pleading, 24th ed., at p. 457, where it is said that "The testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of his statement," and *Neal* is cited as an authority for that proposition. In that case on the trial of an indictment for larceny at the Oxford Assizes, an accomplice of the prisoner was admitted as King's evidence, and Park J., on being told that the only witness who could corroborate his statement was his wife, said, "Confirmation by the wife is, in a case like this, really no confirmation at all. The wife and the accomplice must be taken as one for this purpose," and he directed an acquittal. The decision that in such a case the prisoner is entitled to be acquitted is, in our opinion, wrong. If the wife is to be treated as one with her husband, the proper course would have been to direct the jury that her evidence must be received with caution. But in any event that case has no application here, for there the accomplice whose wife's evidence was held to be inadmissible as corroboration was the witness whom she was tendered to corroborate; in the present case, Brooks was not called. Her identity in law with her husband, if that was the ground of the decision in *Neal*, cannot affect the admissibility of her evidence for the purpose of corroborating a third person. In our opinion that case is no authority for the proposition that Mrs. Brooks's evidence should be treated as if it had been given by her husband, and the Deputy-Chairman was right in refusing so to deal with it.

At the trial another point was raised. Mr. Purcell, who then appeared as counsel for the prisoner, submitted that the evidence of Mrs. Brooks, even if admissible, would not be adequate corroboration unless it corroborated the evidence of Poulton and Davis in some material particular implicating the accused, which

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he contended it did not. That point has not been argued before us, but as there seems to be some misconception as to the present state of the law on that subject, we think it desirable to take this opportunity of clearing up the matter and of restating the rule. Certain statutes provide that certain classes of evidence shall not be sufficient to support a conviction unless corroborated by some other material evidence implicating the accused; but where corroboration is required by the common law it is not subject to any such qualification. In *Everest*, 73 J. P. 269; 2 Cr. App. R. 130 (1909), which was a case of larceny, it was indeed said that "the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused." In a later case, *Wilson*, 6 Cr. App. R. 125 (1911), the Court took a different view. Lord Alverstone C.J. said: "It must not be supposed that corroboration is required amounting to independent evidence implicating the accused," and that view was confirmed in *Blatherwick*, 6 Cr. App. R. 281 (1911), where Lord Alverstone C.J. said in the course of the argument, "*Everest* goes too far; *Wilson* is the correct statement of the law." Those two cases set the matter finally at rest. The question came before this Court again in *Cohen*, 111 L. T. 77; 24 Cox C. C. 215; 10 Cr. App. R. 91 (1914). In that case the principal witness against the prisoner was an accomplice, and one of the questions raised was whether there was sufficient corroboration of his evidence. In delivering the judgment of the Court I said, "We will assume for the purposes of this case, and without deciding it, that the test laid down in *Everest* is the right test to apply." The Court then proceeded to examine the evidence, and came to the conclusion that even from that point of view there was abundant corroboration of the evidence of the accomplice, and the conviction was therefore affirmed. But in the argument at the trial in the present case it seems to have been assumed from what I said in *Cohen* that I intended to throw doubts upon the decisions in *Wilson* and *Blatherwick*, and to reaffirm the rule as laid down in *Everest*. That is a mistake. I said in *Cohen*, "The rule which we propose to apply in this case is that most favourable to the appellant's contention." All I meant was that even if the law had been as was laid down in *Everest*, it would not help the appellant, as there would still be

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sufficient corroboration. It was not the intention of the Court, nor had it any power, to unsettle the law as established in *Wilson* and *Blatherwick*. In our opinion the appeal against conviction fails, and must be dismissed.

On the question of sentence, it was a case in which a serious view was justified. Although it was a first conviction it was pretty evident that this was by no means the first offence. The sentence, therefore, must stand.

Appeal dismissed.

Solicitors for the Appellant—*Peet and Manduell.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ATKIN, AND MR. JUSTICE LOW.

ARTHUR DENOEL.

1916
17 *April.*

If counsel is instructed to set up two inconsistent defences, he is entitled to use his discretion which he will put forward.

This was an appeal against conviction, by leave of Lord Coleridge J. Appellant was convicted of rape on the 16th March, 1916, at the Birmingham Assizes, before A. T. Lawrence J., and was sentenced to twelve months' imprisonment with hard labour.

Norman Birkett for the appellant, who was present. The appellant is a Belgian refugee who was employed at some motor works near Birmingham as a fitter. Many Belgians were employed by that firm, and they lived in a hostel erected by the employers, containing seventy-eight beds. A Mrs. Serrell, the wife of a soldier, was employed at the hostel as chambermaid, and it was her duty to make the beds. On the 1st March, according to the evidence, she went up in the evening to make the appellant's bed; he was working on the night shift, and had been sleeping during the day. He was in the room when she went there, and she alleged that the appellant threw her down transversely across the bed and committed the offence upon her. She then went downstairs and met a man named Hill, who asked what was the matter, and she answered that a Belgian had assaulted her. She admitted that she would not have complained to Hill but for his question. There were other women employed on the premises, but she made

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17 *April.*

ARTHUR DENOEL.

Reading L.C.J. Atkin J. Low J.

no complaint to them. She went home for the night, returning the next day, when she served the appellant with his breakfast; she made no complaint at all until 6 p.m. on that day, when she complained to one Timmins, and, two days later, to the manager of the hostel, who told her in effect that she must prosecute the appellant or go. The appellant was arrested on the 7th March, when he denied having done anything to the woman.

The ground on which he is appealing is that, being unfamiliar with English procedure, he was unable to understand that the counsel who defended him at the trial did not raise the defence of consent, as he had been instructed to do, nor call the appellant, and other witnesses who were in Court, to give evidence on this issue. Counsel was instructed by a solicitor who represented the appellant at the police court; the brief has no reference to the defence of consent, but deals with the case on the footing that the evidence of the prosecutrix was too unreliable to justify a conviction, and counsel's cross-examination was directed to this point. He informs me that the solicitor did tell him just before the trial began that appellant had said that the prosecutrix had consented, and he knew that three or four Belgian witnesses were in court, and he had their proofs, but no proof of the appellant. I submit that counsel who defends a prisoner is not entitled to refrain from putting forward a defence which he has been instructed to put forward. When the appellant was asked whether he had anything to say, he addressed the court in French, and his counsel said, "The prisoner is asking to have translated a defence which was placed at my disposal, but which in my discretion I decided not to put forward." My submission is that counsel has no such discretion. Had the defence of consent been raised there were many features of the case which would have supported it, especially the absence of any complaint until the evening of the following day, except that induced by Hill's question; the main object of evidence of complaint is to negative the defence of consent. *Lillyman*, [1896] 2 Q. B. 167; 65 L. J. M. C. 195; 74 L. T. 730; 44 W. R. 654; 18 Cox C. C. 346; 60 J. P. 536. The circumstances under which the prosecution was instituted, and the absence of any screaming, except possibly one scream, were also material on this issue.

Sandlands, for the Crown, was not called upon.

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ARTHUR DENOEL.

Reading L.C.J.

The LORD CHIEF JUSTICE: The appellant was convicted of rape, and was sentenced to twelve months' imprisonment with hard labour. In this Court he has argued through Mr. Birkett that the verdict of the jury and the conviction should be quashed on the ground that a defence which he wished set up, and of which he informed his counsel, was not set up by his counsel at the trial, and further that certain witnesses were not called to prove facts which he contended were material to that issue. The defence which he wished to raise was that of consent, and it is not unimportant, having regard to the facts, to see whether counsel was instructed to put forward that defence; secondly, whether he was instructed to put forward that defence only, and thirdly, if counsel had any discretion in the matter, whether he exercised it wrongly. Matters of principle are involved in the arguments which have been put forward which may require consideration at some future time, but on the facts of this case we do not think that any matter of principle is involved.

The statement made by the woman is that she was alone in the room with the appellant when he threw her down on the bed. There was a struggle in which her wrists were injured and her neck discoloured; she was very much agitated and gave a scream. She was there for some little time, she says about ten minutes; she then came down to another room and saw Hill, who questioned her, as he said, because of her agitated appearance; she shewed him that her wrists were red, and said that she had been insulted by a Belgian. The important fact is that Hill was attracted by her appearance, and was led by it to ask the question I have indicated. If it is true that she was in that state, with her wrists and neck bruised, it seems to us impossible to come to the conclusion that the act was done with her consent.

The defence made by the appellant through his solicitor at the police court was that he had not committed the act—that is, that the story of the woman was an invention, or at least so unreliable that it ought not to be accepted as true. On arrest he said he had done nothing. At the trial the solicitor instructed counsel with a brief which we are told contained several pages, but nowhere in the brief does he say that the prisoner stated that the woman had consented; but at some stage that statement was made verbally to counsel by the solicitor. On that counsel conducts the case. His whole cross-examination of all the witnesses

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17 *April.*

ARTHUR DENOEL.

Reading L.C.J.

was directed to shew that the testimony of the woman was unreliable, in other words not the truth. The judge, who has had long experience, in passing sentence, said that he thought she had given her evidence well, and said that he believed her. If so, it is established that there had been the attack upon her which she had described, and that the prisoner was the assailant.

Assume that the defence of consent was one which counsel had been formally instructed to put forward, although this Court is not satisfied that he was ever told that that was the defence that the appellant wished put forward; what was counsel to do? He had instructions in writing to contest the fact that there had been connection at all, and to try to induce the jury to say that the story told was not true. He was not in a position, as it seems to us, to say that he would fight the case on the question of consent, and abandon the original defence. Again, suppose that he had been told it was a defence which he might put forward. The two defences were quite inconsistent; no one with experience would attempt to put forward two such defences. The jury would think that a man must know the facts, even if he did not know the law; it only requires to be stated to shew that that kind of defence could not be put forward with much hope of success. As a consequence counsel rested on the defence with regard to which he had been originally instructed. It cannot be said that he was wrong in doing so, and, if he had any discretion in the matter, we think that he exercised it wisely. If any other defence had been put forward it never could have succeeded. We are of opinion that there is no ground for interference in this case, and it does strike us as an odd thing, even if this man had lived in Belgium and was without knowledge of English law, that he should not know that consent is a defence to such a charge in any court. The sentence may run from the date of conviction.

Appeal dismissed.

Solicitors for the Appellant—*Bowman & Ekins,* Birmingham.

A. L. B. T.

ALBERT THOMAS WHITE.

1916
17 *April.*

Reading
L.C.J.
Atkin J.
Low J.

Sentence mitigated in view of lapse of time since last conviction and of there being no previous sentence of penal servitude.

Appeal against sentence.

The appellant, Albert Thomas White, was convicted by the Chairman on April 4th, 1916, at the East Sussex Sessions, of larceny, and was sentenced to five years' penal servitude.

The appellant was convicted, after a considerable number of previous convictions, of stealing boots from a school where they had been kept by the pupils, and was sentenced to five years' penal servitude. He had never been sentenced to a term of penal servitude before, the longest sentence he had received being one of twenty months' hard labour in June, 1913. Since that time the offences alleged against him were trivial, and resulted in slight punishments by courts of summary jurisdiction.

The appellant in person.

C. F. Baker for the Crown.

Low J.: In the circumstances of this case we have to consider whether the sentence which has been passed on the appellant is not excessive. Taking into account the time that has elapsed since his last serious offence and the fact that he has never previously been sentenced to penal servitude, the Court is of opinion that the sentence is too severe, and that it should be reduced to one of twenty months' hard labour.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LUSH, AND MR. JUSTICE ROWLATT.

1916
8 *May.*

HENRY HARRIS.

On an indictment under s. 60 of 24 & 25 Vict. c. 96, the Larceny Act, 1861, the value of the goods stolen must be proved to be five pounds.

This was an appeal against sentence by leave of the full Court. Appellant was convicted on the 13th March, 1916, at the Central Criminal Court, before the Recorder, of larceny in a dwelling-house, after previous convictions, and was sentenced to fourteen years' penal servitude.

Appellant in person.

E. C. P. Boyd for the Crown. No question was asked on behalf of the Crown about the value of the property stolen, nor was any direction given to the jury to find whether the value was over £5. Such evidence was given at the police court if the Court may for this purpose refer to the depositions. *Hillman,* 1 Cr. App. R. 49 (1908), is authority that the Court will do so in certain cases.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment under s. 60 of the Larceny Act, 1861, which which charged him with stealing a number of articles, including a cigarette case and a watch, of the value of over £5, and stealing them from a dwelling-house. If these facts were found on a proper direction, it was open to the Recorder to sentence the appellant to fourteen years' penal servitude. In this case he came to the conclusion that it was one where the maximum sentence ought to be imposed. The appellant has been given leave to

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8 *May.*

HENRY HARRIS.

Reading L.C.J.

appeal against that sentence, this Court being of opinion that there was undoubtedly matter for enquiry whether on the evidence, or the direction of the Recorder, it had been proved and found by the jury that the articles stolen were of a value exceeding £5. It is right to say in this case, without going into its disgusting details, that it establishes conduct of a very grave description. On the appellant's own statement he was guilty of enticing persons to come to his house by the use of young men as decoys; when once they had got the victim there, the appellant came into the room and created a commotion, with the result that the victim was anxious to pay money in order to avoid exposure. On the evidence he had either trained, or was using, boys for this purpose. It happened not once, but several times, and was a deliberate means adopted for getting money. Sometimes, as in this case, articles were stolen, and whatever their value, the victim here found that all the contents of his pockets had been taken, and he came back; as a result the appellant was charged, and two boys with him. The victim refused to charge them for reasons which it is not difficult to imagine, but fortunately the charge was pressed, and the appellant and the two boys were convicted. The result was to disclose before the Recorder a state of things which in his opinion rendered it necessary that he should pass the severest sentence allowed by the law, which he thought at that time was fourteen years' penal servitude. It was necessary in his view because of the nature and character of the offence, and because of the system adopted; also because this man was corrupting and debauching youth; and, further, because this class of offence has become much too prevalent; a number of cases had been brought to the notice of the Recorder, and it was essential in the interests of justice and morality that the severest sentence should be imposed. In these circumstances we think he was right in forming the opinion that it was a case for the maximum sentence, but as there was no finding or direction as to the value of the goods stolen, the maximum sentence is ten years' penal servitude, and not fourteen, so we must reduce it to ten years. Our duty is to see that no sentence is passed which is not permissible in law.

Sentence reduced.

A. L. B. T.

1916
8 *May.*

Reading
L.C.J.
Lush J.
Rowlatt J.

ERNEST SAUNDERS.

Hard labour cannot be imposed for an attempt to obtain by false pretences.
When, on an appeal on a point of law, the Court thinks that appellant would have obtained leave to appeal had he applied, it will allow sentence to run from the date of conviction.

This was an appeal against conviction on a point of law, and an application for leave to appeal against sentence. Appellant was convicted on the 7th April, 1916, at the Carmarthenshire Sessions, of attempting to obtain money by false pretences, and was sentenced to six months' imprisonment with hard labour.

D. Rowland Thomas for the appellant, who was not present. The appellant was charged with attempting to cause the Great Western Railway Company to pay £4 7*s*. to the firm of Franklin, Davey & Co., of Bristol, for the benefit of the appellant. He is a wholesale tobacconist at Llanelly, and had done business for some years with Franklin, Davey & Co. On the 3rd December, 1915, he sent them an order for tobacco. The firm had been asked by the railway company to let them know when they next despatched a parcel to the appellant, and to check the contents carefully. It is clear that a trap was set for him by the railway company. An inspector intercepted the parcel at Landore, checked the contents, and put some brown paper in a space in the parcel. It was kept under observation and taken to Llanelly, where the parcels clerk was told to point out to the appellant that it was in a damaged condition, and he did so when the appellant came in a motor to fetch the parcel. The appellant desired to sign the sheet "not examined," but the parcels clerk suggested that he should open it there. He did so, and marked certain packets amounting to twelve pounds of tobacco as missing. On the 8th December the appellant notified Franklin, Davey & Co. of the loss, putting the value of the missing packets at £4 7*s*. By the desire of the railway company, a notice of the shortage was sent to them, but at no time did the appellant make any claim on them. Franklin, Davey & Co., in the course of business, credited the appellant with £4 7*s*.

It is true that where the person from whom money is sought to be obtained by false pretences knows that the statements made

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8 *May.*

ERNEST SAUNDERS.

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L.C.J.
Lush J.
Rowlatt J.

are false, the prisoner can still be convicted of the attempt to obtain money by false pretences: *Hensler*, 22 L. T. 691; 16 W. R. 108; 11 Cox C. C. 570 (1870), but in all the reported cases of that kind the person from whom the money was sought to be obtained was the prosecutor; therefore, if the appellant was to be proceeded against here, the prosecutors ought to have been Franklin, Davey & Co. If that firm had satisfied the claim, and had claimed on the railway company, a payment by the latter would not have been for the benefit of the appellant. There was no evidence of any attempt on the part of the appellant to get the Great Western Railway Company to pay Franklin, Davey & Co. All he said in his letter to the firm was, "We are notifying the Great Western Railway this evening." The notification to the railway company was not sent by his own wish, but at the suggestion of the railway company.

The sentence was excessive, as there was no power to impose hard labour, which is admitted by counsel for the Crown, and I ask that the sentence may run from the date of conviction.

Marlay Samson, for the Crown, was not called upon.

ROWLATT J.: The appellant was convicted on an indictment which charged him with making certain false pretences to Franklin, Davey & Co., by means whereof he attempted to cause the Great Western Railway Company to pay £4 10*s*. to Franklin, Davey & Co., for the benefit of the appellant. The facts are that the firm consigned tobacco to the appellant by the Great Western Railway. He alleged both to the firm and to the railway company that the parcel had been broken into and some of the contents abstracted. The railway company knew that this had not been done, as a trap had been laid to detect the fraud. On the appellant going to the railway station, and on the invitation of the railway company, he made the complaint that twelve pounds of tobacco was missing. He then wrote to Franklin, Davey & Co., asking them to credit him with the value, and stating that he had notified the railway company. It is necessary in order that the conviction should be maintained that the appellant should have attempted to get the railway company to pay the money to Franklin, Davey & Co., and for his own benefit. It is necessary, therefore, that when he applied to Franklin, Davey & Co. for the

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8 *May.*

ERNEST SAUNDERS.

Rowlatt J.

money, a true or possible inference should be that he asked for it with a view to their passing the claim on to the railway company, in order to sustain the claim made by him. In the opinion of the Court the facts amply warrant that inference; the fact that he wrote to the firm in that manner may well be construed in that way. In those circumstances we think the verdict cannot be interfered with.

There remains the question of sentence. It is admitted that an attempt to obtain money by false pretences is merely a common law misdemeanour, for which the sentence is imprisonment without hard labour, and therefore the hard labour must go. The further question therefore arises whether the time already served may count. The appellant appealed on law as a matter of right, but he was bound to have obtained leave to appeal against sentence if the point of law had not been raised, so he ought to be in the same position as if he had obtained leave to appeal. The sentence will therefore be six months' imprisonment in the second division, to run from the date of conviction.

Sentence reduced.

Solicitor for the Appellant—*William Davies*, Llanelly.

Solicitor for the Crown—*L. B. Page.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LUSH, AND MR. JUSTICE SANKEY.

ESTHER ISABELLA DAVIES.

1916
15 *May.*

Sentence mitigated, in view, partly, of influence exercised by defendant's brother upon her.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted on the 4th April, 1916, at the Hertfordshire Sessions, of obtaining credit under false pretences and by fraud, and was sentenced to twelve months' imprisonment with hard labour.

Appellant in person.

The Crown was not represented, the Court having stated when giving leave to appeal that, unless the Director of Public Prosecutions desired to bring any special fact to the notice of the Court, it was not necessary that he should instruct counsel.

THE LORD CHIEF JUSTICE: In this case the appellant was convicted with her brother on an indictment charging them with obtaining by false pretences credit for food and lodging. They were each sentenced to twelve months' imprisonment with hard labour. The Court sees no reason for interfering with the conviction but it gave leave to appeal against sentence because it was not satisfied that when imposing the sentences the Chairman took into account the difference between the man and the woman. The man had already been convicted and sentenced to eighteen months' imprisonment for a similar offence. It is true that the woman was also convicted on that occasion, and was bound over,

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15 *May.*

ESTHER ISABELLA DAVIES.

Reading L.C.J.

but viewing all the facts as they were presented to the court, we think that there was a substantial difference in the gravity of the two offences. The appellant seems to be a good deal under the influence of her brother, and the Court has come to the decision that instead of each term being twelve months, the sentence ought to be reduced in the case of the woman to one of four months' imprisonment without hard labour, to run from the date of conviction.

Sentence reduced.

A. L. B. T.

[The Court (The Lord Chief Justice, and Scrutton and Avory JJ.) also sat on May 22nd.]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SCRUTTON, AND MR. JUSTICE SHEARMAN.

ERNEST SAUNDERS.

1916
5 June.

The Lord Chief Justice called attention to the report of the judgment in this case (p. 58, above). Counsel on both sides had accepted the view that imprisonment with hard labour could not be imposed for a common law misdemeanour, overlooking the fact that s. 16 (1) of 4 & 5 Geo. 5, c. 58, the Criminal Justice Administration Act, 1914, had altered the law (*a*) in this respect —a point which was not mentioned to the Court, which thought that a sentence of hard labour was, in the circumstances, excessive.

ALBERT BRIGHT.

Severity of sentence.

The Court granted the application for leave to appeal against sentence to penal servitude for life passed by Avory J. at the Leeds Assizes, on May 5th, 1916, for an offence under the Defence of the Realm Consolidation Act, 1915, 5 Geo. 5, c. 8. Applicant pleaded guilty. (See p. 69, below.)

(*a*) **The first line of the headnote, p. 56, is, therefore, erroneous.**

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Reading L.C.J.
Scrutton J.
Shearman J.

GEORGE WATSON.

On an indictment for receiving stolen property with guilty knowledge there cannot be a conviction for being an accessory after the fact: Fallon, *L. & C.* 217 (1862), *followed.*

Proof of some form of possession is essential to sustain such an indictment.

Appeal against conviction.

Appellant was convicted before the Recorder, at the Manchester City Sessions, on May 10th, 1916, on an indictment charging him in the first count, jointly with two others, Alfred Walker and George Collins, with shop-breaking and the larceny of certain jewellery, and jointly with them in the second count with receiving the jewellery knowing it to have been stolen. Walker pleaded guilty to this count. The jury acquitted all three prisoners on the first count. They found Collins guilty on the second count, and in respect of appellant returned a verdict in the following terms: "We find George Watson guilty of being a negotiator and in the full knowledge that the goods were stolen." This was entered as a verdict of guilty. Appellant was sentenced to three years' penal servitude.

E. T. Nelson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The evidence shewed that the shop had been broken into on April 1st, 1916, and jewellery consisting of brooches, rings, &c., stolen therefrom. Three days later Walker, Collins and the appellant were arrested while in each other's company, and on Walker some of the stolen property was found. The only evidence against the appellant was, first, the fact of his being in the company of the other prisoners, and secondly, the fact that on the same day he had accompanied them across the ferry from Liverpool to Seacombe, and had then gone alone to a jeweller, and asked him if he would buy some stuff, about 36 oz. in gold, that had been got from a pawnshop outside London "on the cross," that is, had been stolen. In his evidence at the trial the appellant said that he accidentally met Walker and Collins, who asked him if he could find a purchaser for some jewellery which had been got on the cross, and that he went to the jeweller accordingly.

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The appellant is indicted for the principal offence of receiving the goods knowing them to have been stolen, and is not indicted as an accessory after the fact, as he could have been under s. 3 of the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94). Therefore it must be shewn that he was in possession, either solely or jointly, of the stolen jewellery or had control over it. There is no evidence of this. *Wiley*, 2 Den. C. C. 37 (1850), shews that criminal intent to receive with a knowledge that the goods were stolen is not sufficient. These goods never were in the appellant's possession; he never saw them.

[SHEARMAN J. referred to *Smith*, 1 Dears. & P. 494 (1855).]

But in that case there was evidence that the watch was in the prisoner's control, which is the true test. *Gleed*, 12 Cr. App. R. 32 (1916). There is no reported case where a person helping to dispose of stolen goods who has not had possession or control of them has been convicted as a receiver.

[SCRUTTON J.: *Fallon*, Leigh & Cave 217; 32 L. J. M. C. 66 (1862), is conclusive to shew that where a man is indicted as a principal, he cannot be convicted if the evidence shews that he was an accessory after the fact.]

J. B. Sandbach for the Crown. The jury found that the appellant was a negotiator with knowledge that the goods were stolen. That, in law, makes him a receiver.

[SHEARMAN J.: The jury were directed by the Recorder that if they believed that the appellant assisted the other prisoners to get rid of the stolen goods they could convict him of the receiving. No question was left to them whether he had possession or control of them.]

On a proper direction the jury must have found that he was in possession. Receiving continues as long as the goods are in the possession of the receiver, therefore the appellant, who was in company with Walker while the goods were in Walker's possession, was also in possession of them. It is clear that if all three had gone into the jeweller's shop together, each would be a

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receiver; it can make no difference that the appellant alone went in.

The LORD CHIEF JUSTICE: The appellant was convicted of receiving stolen goods, and sentenced to three years' penal servitude. He was jointly indicted with two other persons, Walker and Collins. The first count of the indictment was for shop-breaking and larceny, and the second count for receiving the goods knowing them to have been stolen. There was no evidence against the appellant, or indeed against the other two prisoners, of shop-breaking or larceny, and the Recorder so directed the jury. The only question left to them was whether the three prisoners charged were guilty of receiving the goods knowing them to have been stolen. With regard to Walker and Collins no question arises, as their cases are not before us. The case against the appellant stands on a different footing. It appears that he met the other prisoners, who told him that they had some stuff which was stolen. He asked them what sort of stuff it was, and they said rings and brooches and other stuff, about 36 oz. The appellant then brought them across the ferry—this conversation took place in Liverpool—and went to the jeweller and asked him if he would buy about 36 oz. of gold. He told the jeweller that it was got from some place outside London, "on the cross." The jeweller declined to have anything to do with it, and later on the same day Walker and Collins and the appellant were seen together. At the close of the case for the prosecution, counsel for the appellant submitted that there was no case to go to the jury, on the ground that there was no evidence that the stolen property was ever in the possession or control of the appellant. The Recorder decided to leave the case to the jury. He accepted the view presented by counsel for the Crown, that the appellant could be convicted under the Accessories and Abettors Act, 1861, on the count charging him with the substantive offence of receiving, notwithstanding that he was not indicted as an accessory after the fact.

The Recorder directed the jury as follows: "If this man assisted to get rid of stolen goods, then he has been aiding and abetting them, and you can convict him of receiving the goods knowing them to have been stolen. I tell you that is the law. If he aids and abets them to get rid of these stolen goods, then he can be

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convicted of receiving these goods knowing them to have been stolen." Then he proceeded to deal with the evidence above mentioned, and said, "Well, on that he is aiding and abetting people who have received stolen goods, and on that the law is that he also can be convicted of receiving these goods knowing them to have been stolen." The question is whether this is a right direction. The jury found a verdict in these terms: "We find George Watson guilty of being a negotiator, and in the full knowledge that the goods were stolen." That was taken by the Recorder as a verdict of guilty on the second count, and it is contended that this special verdict is not a verdict of receiving the goods knowing them to be stolen. Now it is clear from the case of *Fallon*, decided in 1862, the year after the passing of the Accessories and Abettors Act, 1861, that if a person is indicted as a principal, and not as an accessory after the fact to the crime for which he is indicted as a principal, he cannot be convicted if the evidence shews that he is an accessory after the fact, that is to say, if he is charged with being a principal, and evidence supports the charge, clearly he can be convicted; but if the evidence shews that he is an accessory after the fact, he cannot be convicted of the substantive offence with which he is charged as a principal merely because the evidence shews he was an accessory after the fact. *Fallon* is directly in point, and the later case of *Richards* v. *The Queen*, 61 J. P. 389 (1897), is to the same effect. It therefore follows that in this case the appellant could not be convicted as an accessory after the fact on the count charging him with being a principal, either of stealing or receiving, and if the case rested merely on that question there would be no doubt of the result on the authorities. But the Recorder in summing up does apparently treat the case as one of the appellant being an accessory after the fact, and of aiding and abetting in the commission of the offence. It is not quite clear to us what the Recorder meant by his direction. Had he directed the jury that if they came to the conclusion upon the evidence that the appellant was in possession of the stolen property either by himself or jointly with the other prisoners, in the sense that he had either exclusive or joint control of it, and the jury had accepted that view on the facts, the conviction might have been supported. But we cannot find in the direction any indication to the jury that that was the point to which they must direct their attention, and we must come

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to the conclusion that the direction as it stands cannot be supported. Moreover the jury, by their verdict, have left it in doubt, to say the least of it, whether the appellant was in their view in sole or joint possession of the stolen property, or whether he had possession in the sense of having control. They found that he was a negotiator for disposing of the jewellery, in the full knowledge that the goods were stolen, but in our opinion this is not a finding that he was in possession or control of the goods. If he was merely a person directing the other two to a place where they might conveniently dispose of the stolen property, or was merely acting in the capacity of a messenger or conduit pipe between the intending purchaser and the receivers, he could not be convicted of the offence of receiving. Therefore, there is a direction which is not right in law, and a verdict which does not affirm against the appellant that which might have been found on the evidence if there had been a proper direction. That being so, notwithstanding that there is the clearest evidence that the appellant, with full knowledge that the other two prisoners were in possession of stolen property, was assisting them to get rid of it, we cannot find that it is possible to support the conviction. The powers of the Court of Criminal Appeal do not enable us to enter a different verdict against the appellant where there is no count in the indictment which would support a different verdict (*a*). Moreover, we cannot come to the conclusion that on a right direction the jury would have found a verdict against the appellant. They might have convicted him, but that is not sufficient. We must be satisfied that they would have found such a verdict, and the ambiguous answer of the jury makes us doubt what verdict they would have given on a proper direction. For these reasons there is no alternative but to quash this conviction.

Conviction quashed.

W. L. L. B.

(*a*) See s. 5 (2) of the Criminal Appeal Act, 1907.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HORRIDGE, AND MR. JUSTICE BAILHACHE.

FREDERICK WILLIAM LEE.

1916
8 *June.*

Application for leave to appeal granted where, in exceptional circumstances, an important point for the defence was not taken, but refused on a point which could have been taken at the trial.

Applicant was convicted at the Central Criminal Court on May 24th, of larceny, before Avory J., and sentenced to nine months' imprisonment with hard labour; the application, referred by Lush J., was for leave to appeal against conviction and sentence and for bail.

Fenton, for the appellant, stated that he had been instructed for the defence at the trial, but the case had suddenly been transferred from the bottom of the Recorder's list (which the defendant's solicitor was watching) for immediate trial before the learned judge. He (counsel) was engaged elsewhere at the time, and the judge, after consulting defendant, requested another counsel to defend him, and this was done. But counsel defending had no instructions that defendant complained of the arrangements by the police for identification by the chief witness for the prosecution, Smith, and consequently there was no cross-examination at all on this point. Applicant was admittedly a man of good character. He was undoubtedly prejudiced by the absence of his properly instructed counsel at the trial, as if the identification could have been challenged, that fact must have affected the jury. He would also like to call witnesses to prove his whereabouts at the time Smith said he accosted him (Smith).

The Court said that in the very exceptional circumstances of the case, as—though both the trial judge and the Court thought that counsel defending had done all that was possible on the materials

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he had—it was possible the applicant had been prejudiced, they would give leave to appeal on the point of identification (but not on that of an *alibi*, as that could have been proved at the trial), both the applicant and the Crown being at liberty to call such witnesses as they thought fit on the point of identification. Bail was refused.

Leave to appeal granted (*a*).

Solicitor for Applicant—*James Varcoe.*

(*a*) See p. 73, below.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, AND MR. JUSTICE HORRIDGE.

ALBERT BRIGHT.

1916
23 *June.*

After a conviction or plea of guilty, a judge is entitled to hear evidence with a view to discovering defendant's motive, but he must not attribute a motive which has been negatived by the jury, or assume that defendant has committed the crime alleged against him with an indictable statutory aggravation which was not alleged: Hodgkinson *and* Manning, 64 *J. P.* 808 (1901), *doubted.*

Severity of sentence mitigated on a point of law.

This was an appeal against sentence by leave of the full Court. Appellant was convicted on the 5th May, 1916, at the Leeds Assizes, before Avory J., of offences under the Defence of the Realm Act, and was sentenced to penal servitude for life. (P. 61, above.)

Macaskie for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant pleaded guilty to an indictment charging him under Regulation 18 of the Defence of the Realm (Consolidation) Regulations, 1914, with obtaining and attempting to elicit without lawful authority information with regard to the manufacture of war materials, and with being in possession without lawful authority of documents relating to the war. By Regulation 57 the sentence for such an offence is "penal servitude for life or any less punishment, or if the court finds that the offence was committed with the intention of assisting the enemy, to suffer death or any less punishment." The indictment did not charge the appellant with any intent to assist the enemy; if it had been desired to submit evidence of any such intent it would have been necessary to insert such a charge in the indictment. The Indictments Act, 1915, s. 3 (1), further enacts

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that "Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge." The appellant had obtained information from Vickers, Limited, of Sheffield, but it is in his favour that he had been obtaining such information as far back as 1905, before the war. Mr. Tindal Atkinson, who appeared for the Crown, said that he was not in a position to put forward any evidence of intent, and that the evidence on the depositions was consistent with the appellant having intended to help a friendly country. Evidence was, however, given by two soldiers who had been in the cells with appellant to the effect that he had suggested that they should mutiny against their superior officers. Such evidence to try and prove motive after a plea of guilty was inadmissible. *Hodgkinson and Manning*, 64 J. P. 808 (1901).

[DARLING J.: That was a decision of mine given sixteen years ago; I am not sure now that it was right.]

See also *Ellis*, 6 B. & C. 145, at 148; 9 D. & R. 174; 5 L. J. (O. S.) M. C. 1 (1826). In passing sentence, Avory J. said: "But for the plea of guilty the jury would have been charged to enquire whether these acts were done with the intent to assist the enemy." That was wrong. The indictment did not allege any such intent.

[*Tindal Atkinson, K.C.*: I agree; see *M.*, 32 T. L. R. 1; 11 Cr. App. R. 207 (1915).]

Avory J. continued: "It would have been difficult for the jury on the facts to drawn any other inference than that you were doing this as a traitor to your country, with the intention of assisting the enemy. If the jury had found such an intent I should have had no hesitation in passing sentence of death. Your conversation with the soldiers does throw considerable light on your motives. It is sufficient to shew that you are a disloyal subject, and the step from that to the inference that you were intending to assist the enemy is small; I cannot doubt that if the jury had had to

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enquire they would have found that fact against you." I submit that the judge was wrong in principle, and that he sentenced appellant for the major charge when he had only pleaded guilty to the minor charge.

Tindal Atkinson, K.C. (with him *G. F. L. Mortimer*) for the Crown. The assumption that the judge was not entitled to take appellant's motive into consideration, unless it was alleged in the indictment and proved, is a mistaken one. The only object of such proof is to entitle the judge to pass sentence of death. Where a prisoner pleads guilty the judge is entitled to infer any motive which the evidence warrants, and to pass whatever sentence he thinks appropriate, short of death. The evidence of the two soldiers was admissible, and did point to appellant being a traitor.

DARLING J.: In this case the appellant pleaded guilty to an indictment which charged him with attempting to collect information with regard to the manufacture of war materials without lawful excuse, which is made an offence by Regulation 18 of the Defence of the Realm (Consolidation) Regulations, 1914; he was sentenced to penal servitude for life. It is not necessary to go into the facts which have been fully dealt with by counsel, and we need only deal with the objections that have been taken to the sentence, this being an appeal against sentence only. I am not going to recapitulate the arguments put forward, but to state the conclusions to which the Court has come. With regard to the two witnesses who were heard after the appellant had pleaded guilty, and before sentence was passed, the judge heard their evidence in order to decide on the degree of culpability and the sentence that was due. The Court is distinctly of the opinion that he had a right to hear those witnesses. Before passing sentence the judge considered the appellant's motives; the Court is of opinion that he had a perfect right to consider motives, whether they were good or bad. There is no legal ground for saying that a judge may only consider motives if he decides that they were good motives. He should consider both, and award a severe or lenient sentence according to the category in which he places them. Although that is so, the judge must not in our opinion attribute motives to the prisoner which have been nega-

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Darling J.

tived by the jury, provided that they have been submitted to, and decided by, them. Further, we are of opinion that the judge must not attribute to the prisoner that he is guilty of a crime which is not charged in the indictment, nor of a statutory aggravation of the crime which might and should have been charged in the indictment if he was to be punished for the aggravation.

Applying those principles, we think that the judge might have passed this sentence without giving any reasons, a discretion with which the Court might not have interfered. In this case, however, when we consider the circumstances, we are of opinion that Avory J. stated the reasons which influenced him, and we are of opinion that he included the assumption that the appellant did the acts with which he was charged with intent to assist the enemy. It is therefore necessary for us to look at the whole case and see whether the sentence can be justified on any other ground than those which influenced the judge. It is clear on the evidence that the appellant was collecting information with respect to war materials of a character which would be very valuable to the enemy, or to any other person. That is the kind of information which he was collecting. That is a different matter from the use which he might make of it, and that is where we think Avory J. did not act within the principles which we have defined. The offence was a very grave one, and the consequences might have been very serious to this country; the appellant might have gone a step further, which would have exposed him to the capital sentence. That is excluded. Seeing the present conditions, that we are at war, and having regard to the fact that the information would have been very useful to the enemy as well as to other people, we think the sentence, although it can be reduced, must be ten years' penal servitude.

Sentence reduced.

A. L. B. T.

FREDERICK WILLIAM LEE.

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Fresh evidence on the circumstances of identification.

This was an appeal against conviction and sentence, by leave of the full Court (see p. 67, above).

G. L. Hardy for the appellant, who was present. Leave was given to appeal on the question of the identification of the appellant by a lad named Smith. Counsel who appeared before this court on the application for leave to appeal, is unable to be here to-day, but I have had a long conference with him. Appellant alleges that Smith came into the charge-room where several men were assembled; that while Smith was there appellant was brought in from the cells and told, in the hearing of Smith, to stand where he liked; leave has been given to call evidence with regard to this question.

John Smith, Police-Sergeant Fox, Inspector Carr and *Detective-Inspector Burnham* were called and cross-examined by *Hardy*. They all denied appellant's allegations.

Appellant was called and examined by *Hardy*. He gave evidence bearing out counsel's statement.

J. Campbell, for the Crown, was not called upon.

DARLING J.: Leave was only granted for evidence to be called on the question of identification. The evidence has entirely failed to prove what the appellant suggested. The appeal therefore fails.

Appeal dismissed.

Solicitor for the Appellant—*James Varcoe.*

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE AVORY, AND MR. JUSTICE ATKIN.

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FRANK HERBERT BANKS.

Questions in cross-examination of the defendant, though not relevant to any issue raised by the defence, may be admissible in order to test his veracity.

Cross-examination to a letter written by defendant, but not produced, is improper.

Counsel for the Crown should abstain from appeals to the jury likely to inflame or prejudice their minds.

Proviso to s. 4 (1) *of the Criminal Appeal Act applied.*

Severity of sentence.

Appeal against conviction and sentence.

Appellant was convicted on June 9th, 1916, before Bray J., at the Worcestershire Assizes, of carnally knowing a girl under the age of sixteen years, and was sentenced to twelve months' imprisonment with hard labour.

S. R. C. Bosanquet for the appellant, who was not present. At the trial appellant admitted misconduct with the girl, who was fourteen years of age. At the end of the case for the prosecution, therefore, the only question to go to the jury was whether or not he had reasonable cause to believe that she was of or above the age of sixteen years, which was the defence raised by him. A number of questions were put to the appellant when he was cross-examined which were irrelevant and prejudiced him unfairly. He was asked questions which tended to shew that he was the father of the child which the girl was expecting, he having denied misconduct on any date relevant to that fact. He was also asked concerning a letter which he had written to a woman named Smith in Cheshire, asking her to take care of the girl when the child was born, and also concerning her reply refusing to

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Atkin J.

do so, and giving her reasons for her refusal. The cumulative effect of these questions was that the jury's minds were diverted from the real issue, and were prejudiced against the appellant. Moreover, in his final address to the jury, counsel (at Worcester) for the prosecution, referring to the appellant, said: "I appeal to you, gentlemen, to protect young girls from such men as these." This was no doubt said in answer to my address to the jury, in which I urged the danger of a conviction and appealed for protection for appellant, but in the circumstances of the case it was wrong. See *per* Crompton J., *Rudland*, 4 F. & F. 496 (1865), and *Puddick*, 4 F. & F. 498, 499 (1865).

It is also submitted that the sentence, in view of the appellant's previous good character, and the fact that the prosecution never pretended that the girl had been a virtuous girl before she met appellant, was too severe.

F. J. Tucker, for the Crown, was not called on.

AVORY J.: The appellant, at the trial, admitted that he had connection with the girl, but set up the defence afforded by s. 5 (1) of the Criminal Law Amendment Act, 1885, namely, that at the time he had reasonable cause to believe that she was of or above the age of sixteen years. The Court has already during the argument indicated that s. 5 (1) must be construed as meaning that at the time of the commission of the alleged offence the accused had reasonable cause to believe, *and did believe*, that the girl was of or above the age of sixteen years. The appellant went into the witness-box and gave evidence on his own behalf. A good many criticisms have been addressed to his cross-examination, and it is suggested that many of the questions put were not strictly relevant to the issue raised by the defence. It is clear that some of these questions were not directly relevant to that issue, but they tested the veracity of the appellant in some very important particulars and were admissible on that ground.

There is another objection of a more formidable character, namely, that the contents of the correspondence between the appellant and the woman Smith, were elicited from him. It undoubtedly is open to considerable question whether that cross-examination was strictly regular. The Court thinks that it was not regular to insist that the appellant should give an answer

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FRANK HERBERT BANKS.

AVORY J.

concerning the contents of a letter which was not produced (*a*). We must, therefore, consider whether any miscarriage of justice has resulted. We are clearly of opinion that the jury were not influenced by these questions, because it was not really in dispute that the appellant had written to Smith, who had replied to him.

Finally, counsel for the appellant complained that the counsel who appeared for the prosecution at the trial, in his final speech to the jury, made an observation calculated to inflame and prejudice the minds of the jury. In substance he appealed to the jury to protect young girls from offences of this sort. The criticism is one rather addressed to a matter of taste than to one of actual irregularity in the proceedings. It is quite true that counsel for the prosecution throughout a case ought not to struggle for the verdict against a prisoner, but that they ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice. Such an observation as was made here might not be good taste, and might not be strictly in accordance with the attitude which counsel ought always to bear in mind. But it is impossible to suggest that the jury were misled by any such observations into finding the appellant guilty when the evidence did not satisfy them that he was. For these reasons the appeal against conviction must be dismissed.

The sentence may appear severe in view of the hitherto good record of the appellant, but the Court must bear in mind that the girl was just under fourteen years of age when the offence was first committed. There was no evidence at the trial to support the suggestion that she had been guilty of previous immoral conduct. We therefore see no ground for interfering with the sentence.

Appeal dismissed.

Solicitor for the Appellant—*T. A. Matthews,* Hereford.

G. B.

(*a*) See *Phipson* on Evidence, c. 41 (p. 473, 5th ed.).

THOMAS FINCH.

1916
4 *July.*

When distinct charges are tried on one indictment (the main issue being that of identification) the jury must be directed that if they are satisfied with the defence in respect of some of them it is open to them to acquit of the whole indictment.

It is not sufficient to direct the jury on the law of a case: they are entitled to the judge's assistance on the facts.

Non-direction may amount to misdirection.

When the defence is an alibi *the jury should be directed that they cannot convict unless they definitely reject it.*

Appeal against conviction.

Appellant was convicted on May 13th, 1916, before the Assistant-Recorder, at the Birmingham City Sessions, of larceny, and was sentenced to six months' imprisonment with hard labour.

Hugo Young, K.C., and *Arthur Ward* for the appellant, who was present. The appellant was charged upon an indictment containing seven counts—six containing charges of larceny and the seventh containing a charge of attempting to obtain goods by false pretences. The prosecution alleged that for some time a man had been going about Birmingham stealing different articles from shopkeepers by means of a trick. He would order goods to be delivered at a fictitious address, the purchase money being payable on delivery, and then, intercepting the bearer of the goods, would take them from him without paying for them. The prosecution said that the same man had committed a number of these offences, and that the appellant was the man. The defence in substance was an *alibi,* and a strong case was made out. The evidence of the identification of the appellant was unsatisfactory and somewhat difficult, but the Assistant-Recorder failed to sum up to the jury the evidence of the appellant and the witnesses called on his behalf to prove an *alibi*. He simply pointed out to the jury that they had had forty witnesses before them; that the facts had been very fully dealt with by counsel in their opening and closing speeches, and that they (the jury) had paid great attention to the case, and, after a short direction on the law, he concluded. It is submitted that in the circumstances this non-direction amounted to misdirection and a miscarriage of justice.

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D. L. Finnemore for the Crown. Provided that a judge directs the jury on the law, he need not comment on the evidence if he is not minded to do so. The non-direction here did not amount to misdirection. The facts were dealt with exhaustively by counsel and witnesses, and no miscarriage of justice can have resulted; fourteen witnesses identified appellant; the issue was purely of fact.

He referred to *Nicholls*, 1 Cr. App. R. 167 (1908); *Stoddart*, 2 Cr. App. R. 217 (1909); *McDougall*, 7 Cr. App. R. 130 (1912).

AVORY J.: In this appeal it has been argued that the Assistant-Recorder misdirected the jury in the sense that he did not direct them at all on the issues before them and the evidence relevant thereto. In both criminal courts and civil courts non-direction may in some cases amount to misdirection. Whether it does in any particular case depends upon the facts of that case. Among the authorities quoted to us was that of *Stoddart*, where Alverstone L.C.J. said in his judgment (at p. 246): "Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively." What were the questions raised by "the counsel for the prosecution and for the defence respectively" in this case? The prosecution alleged that the appellant was guilty of the offences charged. The defence was that evidence called on behalf of the appellant shewed conclusively that, as to some of the charges at least, he could not have been at or near the place where the offences had been committed. The first question the jury had to consider was whether the appellant had been satisfactorily identified by the witnesses for the prosecution who professed to do so. It is clear that on this matter observations should have been made to the jury by the Assistant-Recorder, which were not made. If authority is needed I refer to *Bundy*, 5 Cr. App. R. 270 (1910). That case depended entirely upon the identification of the accused man. There were matters in connection with the identification which ought to have been brought to the attention of the jury and had not been, and the conviction was in consequence quashed. Pickford J., in his judgment, said: "If all [this matter in connection with identification] had been pointed out to the jury, we might not have inter-

fered with the verdict. But it was not pointed out at all. . . . The jury were therefore not directed by the learned Deputy-Chairman to the vital point. . . . In all the circumstances it is clear the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence."

I have already said that the attention of the jury was not drawn to the matters surrounding the identification of the appellant. Their attention was not drawn to the most important fact that other persons, who had complained that they had been defrauded in a way similar to that charged against the appellant, had failed to identify him, and that the case for the prosecution was that the same man had committed all these offences. There was a strong case of *alibi* made out by the defence, but the Assistant-Recorder in his summing up did not tell the jury that they must be satisfied that this defence was unsound before they convicted the appellant. The jury should have been told that, if they should find that in one or more of the instances where the appellant was alleged to have committed offences the defence had proved this to be impossible, there would be sufficient ground for their acquitting the appellant upon the whole indictment. The Assistant-Recorder directed the jury on what constituted larceny by a trick and on what constituted attempting to obtain goods by false pretences, but of the facts as proved by the evidence on both sides he said not one word. The Court is of opinion that the jury were entitled to have the assistance of the presiding judge in directing them, and that, in the words of Pickford J., "the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence." In these circumstances a miscarriage of justice may well have occurred, and the Court have therefore come to the conclusion that this appeal must be allowed, and the conviction quashed.

Conviction quashed.

Solicitors for Appellant—*Philip Baker & Co.*, Birmingham.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SCRUTTON, MR. JUSTICE AVORY, MR. JUSTICE ROWLATT, AND MR. JUSTICE ATKIN.

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A review of the cases on the evidence of accomplices shews that the law is that laid down in Stubbs, *Dears. & P.* 555 (1855), *viz.*: "*The rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only and not a rule of law.* Semble, *that a Judge should advise the jury to acquit, unless the testimony of the accomplice be corroborated, not only as to the circumstances of the offence, but also as to the participation in it by the accused, and that where there are several prisoners, and the accomplice is not confirmed as to all, the jury should be directed to acquit the prisoners as to whom he is not confirmed; but held that this being a rule of practice only, if a jury choose to act on the unconfirmed testimony of the accomplice, the conviction cannot be quashed as bad in law.*"

The nature and the extent of such corroboration under certain statutory provisions are the same as those indicated under "the rule of practice" above.

This was an appeal against conviction on points of law. Appellant was convicted, on the 6th May, 1916, at the Central Criminal Court, before the Recorder, of gross indecency with male persons, and was sentenced to twelve months' imprisonment with hard labour.

Marshall Hall, K.C. (with him *Ginsburg*), for the appellant, who was not present. The appellant was convicted of offences with two boys on various dates, which were all uncertain except three, namely, the 3rd, 5th, and 10th December, 1915. The evidence given against him was entirely that of boys, all of whom were accomplices, and there was no evidence of the crime *aliunde* whatever. One of the boys made a statement to the police on

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the 22nd December, but the appellant was not arrested until the 30th March. His flat was searched, but no corroborative evidence was found there. He admitted that the boys had been to his flat, and that he had written a certain letter which was relied on by the prosecution as corroboration. That letter, which was dated 26th November, 1915, was as follows: "Friday. Dear Harry, here is something for you and Charley. As to Sunday week, will you and he meet me as arranged at 8, not 7.30.—B." It was admitted by the appellant that "Harry" was Mann, one of the boys with whom the offences were alleged to have been committed, and that the "something" enclosed in the letter was a ten shilling Treasury note. The Sunday referred to was the 5th December, one of the dates mentioned in the indictment. The defence was that the boys had been invited by the appellant to his flat for innocent purposes as he took an interest in them, and that the prosecution arose from an attempt to blackmail him by the boys. The Recorder directed the jury that there was ample corroboration of the evidence of the accomplices, but if the corroboration need not affect the prisoner in the commission of the crime a premium is put upon blackmailing.

I admit that there is no question that an accomplice is a competent witness; that, except where corroboration is required by statute, the jury, after being properly warned, may, in law, convict on the uncorroborated evidence of one accomplice; but a rule of practice has arisen that it is not safe to allow a jury to act upon such evidence unless it is corroborated; and that one accomplice cannot be corroborated within the meaning of this rule by other accomplices: *Blatherwick*, 6 Cr. App. R. 281 (1911); *Cohen*, 111 L. T. 77; 24 Cox, C. C. 216; 10 Cr. App. R. 91 (1914); and *Watson*, 109 L. T. 335; 23 Cox, C. C. 543; 29 T. L. R. 450; 8 Cr. App. R. 249 (1913). The Criminal Law Amendment Act, 1885, ss. 2 and 3, created new offences and enacted that no person should be convicted of an offence under those sections upon the evidence of one witness only, unless such witness be corroborated in some material particular implicating the accused. No such proviso is to be found in s. 11, the section under which the appellant was convicted; the reason for such omission is, I suggest, that in such offences the principal witness is always an accomplice, and those who drafted the Act thought that it was a rule of law that a person could not be convicted on the uncorroborated evi-

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dence of an accomplice. I submit that in such cases also the corroboration must be of a material fact affecting the accused in the commission of the crime. The rule is stated thus in Taylor on Evidence (10th ed.), Vol. I. s. 970: "The real rule . . . appears to be that the extent of the corroboration required will depend upon the gravity of the crime." See also Russell on Crimes (7th ed.), Vol. II. p. 2286.

The cases are to some extent conflicting, but the general opinion seems to be that confirmation of the accomplice's evidence is necessary, and that it must implicate the accused. In *Wilkes*, 7 C. & P. 272 (1836), Alderson B. said: "The confirmation I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged." See also *Farler*, 8 C. & P. 106 (1837), on which Darling J. founded his judgment in *Everest*, 2 Cr. App. R. 130 (1909). Similar views were expressed in *Dyke*, 8 C. & P. 261 (1838); *Birkett*, 8 C. & P. 732 (1839). In *Avery*, 1 Cox, C. C. 206 (1845), Erle J. left a case to the jury on the uncorroborated evidence of an accomplice; and Coleridge J. expressed the same opinion in *Andrews and Payne*, 1 Cox, C. C. 183 (1845). In *Jenkins*, 1 Cox, C. C. 177 (1845), on the trial of two prisoners, Alderson B. refused to allow corroboration of the evidence of an accomplice against one of them to operate as confirmation of his testimony against the other. See also *Cramp*, 14 Cox, C. C. 390 (1880). In *In re Meunier*, [1894] 2 Q. B. 415; 63 L. J. M. C. 198; 10 R. 400; 71 L. T. 403; 42 W. R. 637; 18 Cox, C. C. 15, Cave J. said: "I know of no power to withdraw the case from the jury for want of corroborative evidence, and I know of no power to set aside a verdict of guilty on that ground"; but that case has since been qualified by the judgment of this Court in *Tate*, [1908] 2 K. B. 680; 77 L. J. K. B. 1043; 99 L. T. 620; 72 J. P. 391; 1 Cr. App. R. 39, where Lord Alverstone C.J. stated that Cave J. ought to have added, "Assuming that the jury were cautioned in accordance with the ordinary practice." *Gay*, 2 Cr. App. R. 327 (1909), is authority that a number of accomplices need corroboration as much as one.

[AVORY J. referred to *Mullins*, 3 Cox, C. C. 526 in 1848.]

But see *Stubbs*, Dears. & P. 555; 23 L. J. M. C. 16; 1 Jur.

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(N. S.) 1115; 4 W. R. 85; 7 Cox, C. C. 48 (1855), where Parke B. said: "My practice has always been to direct the jury not to convict unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner." The identity of the prisoner means in connection with the crime, which crime is proved *aliunde*. In all the decided cases the crime had been proved in fact. In the present case there was no corroboration implicating the appellant in the crime, which is the corroboration necessary according to *Everest*. *Warren*, 73 J. P. 359; 25 T. L. R. 633; 2 Cr. App. R. 194 (1909), is authority that the corroboration must be material. The case of *Kirkham*, 2 Cr. App. R. 253; 73 J. P. 406; 25 T. L. R. 656 (1909), I cannot understand. *Tate* was confirmed in *Kams*, 4 Cr. App. R. 8 (1910); and *Mason*, 5 Cr. App. R. 171 (1910), again laid down that the corroboration must implicate the accused. In *Wilson*, 6 Cr. App. R. 125 (1911), Lord Alverstone C.J. said that the corroboration need not amount to independent evidence implicating the accused. *Everest* was not cited in that case, but in *Blatherwick* Lord Alverstone said, "*Everest* goes too far. *Wilson* is the correct statement of the law."

[Atkin J.: *Mullins* was relied on in *Wilson*, but in *Mullins* it was said that the corroboration should implicate the accused.

The Lord Chief Justice: I think the distinction between such cases and cases where corroboration is required by statute is that in the latter the case must be withdrawn from the jury in the absence of corroboration, whereas in the former the jury must be cautioned and the case must be left to them.]

If that is so, the question arises whether a sufficient caution was given here. In *Watson*, 8 Cr. App. R. 249 (1913), the point was not decided as it was held that it did not arise. In *Crane*, 7 Cr. App. R. 113 (1912), Bray J. cited *Everest* with approval.

[Avory J.: If the jury find that the evidence of the accomplice is corroborated in material particulars, may they not believe him on the identity of the accused ?]

In *Cooper*, 10 Cr. App. R. 195 (1914), medical evidence that the girl accomplice's bodily condition was consistent with her story was held to be corroboration. The facts of the present case shew the danger of that decision, because the bodily condition of one of the boys shewed that the full offence had been committed, though that was admittedly with another man. *Cohen* has been thought to affirm *Everest*, but that error has been corrected in *Willis*, 12 Cr. App. R. 44; 32 T. L. R. 452 (1916). I am asking this Court to say that *Everest* is right if it goes any further than *Wilson*.

The defence was put to the jury in the summing up in the way held necessary in *Goad*, 2 Cr. App. R. 278 (1909), and *Bruhin*, 11 Cr. App. R. 276 (1915). The letter which was relied on as corroboration supported the case for the defence as much as that for the prosecution.

Bodkin (with him *E. C. P. Boyd*) for the Crown. (He was called upon only with regard to the proper direction to be given on the question of corroboration and the rule of law which should apply on the subject.) If *Stubbs* was correctly decided, it is clear that the jury may act on the uncorroborated evidence of an accomplice, but in such cases the strongest possible warning, almost amounting to a direction in law not to convict on the evidence of such a person, should be given. If such a warning is given and the jury still convict, this Court will not interfere. In cautioning the jury the Judge has to have regard to the evidence which is said to constitute corroboration; if that evidence is strong and cogent the caution may be proportionately less emphatic. In *Everest* Darling J. used the word "implicate," I think for the first time; the word is too strong if it means more than "bring into connection with" or "shew to be concerned in." "Affect" better expresses the practice of the Court, and that is the word which the Recorder used. I submit that the true direction must be that there must be some corroboration in the circumstances of the case which affects the accused, and enables the jury to say that the evidence of the accomplice on the whole is to be believed. The rule is correctly stated in the last paragraph of Stephen's Digest of the Law of Evidence, Art. 121. The corroboration which is necessary by statute must be stronger than that which is required at common law.

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[ATKIN J.: I cannot see why there should be any distinction.]

If there are two prisoners, and the evidence of the accomplice is corroborated about one only, a much stronger caution should be given with regard to the other. In *Cohen* the facts relied on as corroboration did not implicate the accused, but were facts which tended to shew that the accomplice was speaking the truth. That case was, therefore, more within the rule laid down in *Wilson* than that laid down in *Everest*.

The LORD CHIEF JUSTICE: The Court is of opinion that this appeal must be dismissed, even assuming that it accepts the proposition contended for by Mr. Marshall Hall. We are of opinion that there was corroboration implicating the accused, if that is the proper test. Further, we are of opinion that a proper warning was given to the jury, and that the defence was properly put to them. Consequently, the appeal fails on all grounds. We will give our reasons at a later date. The sentence will date from conviction.

Appeal dismissed.

A. L. B. T.

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The LORD CHIEF JUSTICE read the following judgment: The appellant was convicted of having committed offences under s. 11 of 48 & 49 Vict. c. 69, the Criminal Law Amendment Act, 1885, with three boys. He appeals to this Court on the ground that there was no such corroborative evidence as is required by law of the testimony of the three boys who were called for the prosecution at the trial and were accomplices in the crime. There is no statutory provision requiring corroboration applicable to these offences.

At the close of the arguments we decided that there was abundant corroboration. In addition to the testimony of the accomplices, the following facts were given in evidence. A letter was proved to have been sent to one of the boys by the appellant in his handwriting signed by him with his initial B., without any address on the letter, enclosing a 10*s.* note to "Dear Harry," one of the boys, for himself and "Charlie," another of the boys, and

making an appointment for them to meet the appellant "as arranged," without naming the place and at a time stated. The prisoner had admitted to the police that the three boys had been at his flat, that he knew one as a page boy at the Trocadero Restaurant, and that this boy had been to see him on several occasions with another boy, and the appellant suggested to the police that he belonged to a boys' club and, therefore, was entitled to invite any of the members to his place. The appellant was not a member of a boys' club. The appellant gave evidence at the trial and admitted that he had given money to two of the boys on various occasions, and that, on hearing a peculiar whistle outside his flat, he had gone downstairs to let the boys in. We entertained no doubt that this evidence afforded ample corroboration of the boys' testimony, even if we assumed that the corroboration required was corroboration "in some material particular implicating the accused." The learned Recorder directed the jury that they must not convict upon the testimony of the accomplices unless they were satisfied that there was "corroboration in some material particular affecting the accused." We were of opinion that in any event this direction gave no cause of complaint to the appellant. The warning by the Recorder to the jury was sufficient, if indeed not more than sufficient. We, therefore, announced that the appeal would be dismissed.

Having regard, however, to the arguments addressed to the Court, and to the difficulty of reconciling all the opinions expressed in the cases cited, and to the general importance of reviewing and re-stating the law applicable to corroboration of the evidence of accomplices, we took time to consider our judgment.

There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. See *R.* v. *Atwood* (1787), 1 Leach, 464. But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. *Reg.* v. *Stubbs* (1855), Dears. & P. p. 555; and *R.* v. *Meunier*, [1894] 2 Q. B. 415.

This rule of practice has become virtually equivalent to a rule of law, and since the Criminal Appeal Act came into operation

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this Court has held that, in the absence of such a warning by the judge, the conviction must be quashed. *R.* v. *Tate*, [1908] 2 K. B. 680; 1 Cr. App. R. 39. If after the proper caution by the judge, the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand, this Court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this Court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this Court, after considering all the circumstances of the case, thinks the verdict "unreasonable," or that it "cannot be supported having regard to the evidence": Criminal Appeal Act, 1907, s. 4, sub-s. 1. This jurisdiction gives larger powers to interfere with verdicts than had heretofore existed in criminal cases.

In addition to the rule of practice above mentioned, there are, with regard to certain offences, statutory provisions "that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused" (*e.g.*, the Criminal Law Amendment Act, 1885, ss. 2 and 3). In these cases the law is that the judge, in the absence of such corroborative evidence, must stop the case at the close of the prosecution and direct the jury to acquit the accused. Where no such statutory provision is applicable to the offence charged, and the evidence for the prosecution consists of the uncorroborated testimony of an accomplice or accomplices, the law is that the judge should leave the case to the jury after giving them the caution already mentioned.

As the rule of practice at common law was founded originally upon the exercise of the discretion of the judge at the trial, and, moreover, as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example, "Confirmation does not

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mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary." *R.* v. *Mullins* (1848), 3 Cox C. C., *per* Maule J., p. 531. Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and therefore one accomplice's evidence is not corroboration of the testimony of another accomplice. *R.* v. *Noakes* (1832), 5 C. & P. 326. The difference of opinion has arisen in the main in reference to the question whether the corroborative evidence must connect the accused with the crime. The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. If the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it, or if the only independent evidence relates to the identity of the accused without connecting him with the crime, is it corroborative evidence? There are some expressions to be found in the books which imply that it may be, and in *Rex* v. *Birkett and Brady* (1813), Russell and Ryan, 251, the judges were of opinion that an accomplice did not require confirmation as to the person he charged, if he was confirmed as to the particulars of his story. The case is very imperfectly reported, and the evidence is not stated. It was not argued by counsel, but was stated verbally to a meeting of the judges by the judge who tried the case. There are other cases where it has been held that a conviction on such evidence could not be quashed by the Court, but the *ratio decidendi* is that as an accomplice is a competent witness and the jury thought him worthy of credit, the verdict was in accordance with law. *R.* v. *Atwood* (1788), 1 Leach, 464; and *R.* v. *Jones* (1809), 2 Campbell's Reports, 132. There are other cases where it has been held that on such evidence the case cannot be withdrawn from the jury. *R.* v. *Hastings* (1835), 7 C. & P., p. 152; *R.* v. *Andrews* (1845), 1 Cox C. C., *per* Coleridge J., p. 144; and *R.* v. *Avery* (1845), *ib.* 206, *per* Erle J. After examining these and other

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authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *Reg.* v. *Stubbs* (1855), Dears. & P. p. 555, by Parke B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime. Parke B. gave this opinion as a result of twenty-five years' practice, it was accepted by the other judges and has been much relied upon in later cases. In *R.* v. *Wilkes* (1836), 7 C. & P. 272, Alderson B. said: "The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice, if you can safely rely on his testimony, but I advise juries never to act on the evidence of an accomplice unless he is confirmed as to the particular person who is charged with the offence." In *Reg.* v. *Farler* (1837), 8 C. & P. 107, Lord Abinger, C.B., said: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only the truth of that history, without identifying the persons, that is really no corroboration at all. . . . It would not at all tend to shew that the party accused participated in it." In *Reg.* v. *Dyke* (1838), 8 C. & P. 261, Gurney B. said: "Although in some instances it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the transaction." In *Reg.* v. *Birkett* (1839), 8 C. & P. 732, the prisoner was indicted for receiving stolen sheep. The evidence consisted of the statement of an accomplice, and to confirm it, it was proved that a quantity of mutton corresponding in size with the sheep stolen was found

in the prisoner's house. Patteson J. said: "If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient, . . . but here we have a good deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury."

These cases lead to the view expressed later by Parke B. in *Reg.* v. *Stubbs*, and shew that in his time, although there had been doubt in the past, the law as formulated by him was accepted as the correct opinion, and continued to be the law to the time of the passing of the Criminal Appeal Act, and in our judgment to the present day.

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The language of the statute, "implicating the accused," compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shews or tends to shew that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *R.* v. *Birkett*, 8 C. & P. 732. Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice.

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The decisions of this Court upon the nature of the corroboration required call for some examination, and it is because they do not always appear to be to the same effect that this Court was specially constituted in order that we might lay down rules for future guidance.

In *R.* v. *Everest*, 2 Cr. App. R. 130, the Court said: "The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused." We think "tell the jury to acquit" should read "warn the jury of the danger of convicting." There is no statement in the report of the exact warning given by the judge. In *R.* v. *Wilson*, 6 Cr. App. R. 128, there was an abundant caution, and the Court said: "It must not be supposed that corroboration is required amounting to independent evidence implicating the accused." If this means that the judge should not warn the jury to require independent corroboration of some part of the story which implicates or involves the accused, it goes too far.

In *R.* v. *Blatherwick*, 6 Cr. App. R. 281, the Court said: "*Everest* goes too far. *Wilson* is the correct statement of the law." We agree that *Everest* goes too far in saying that the judge should direct the jury to acquit, but *Everest* is the better statement of the law as regards the corroboration for which the jury should look.

In *Bradshaw* v. *Waterlow & Sons*, [1915] 3 K. B. p. 534, Pickford L.J., in the Court of Appeal, was of opinion that *Wilson's* and *Blatherwick's* cases [and *Brown's*, 6 Cr. App. R. 24, 147 (1910, 1911), and *Crane's*, 7 Cr. App. R. 113; 1912] "show that it is not necessary to have corroboration directly implicating the accused if the corroboration which exists supports the truth of the story as a whole." The learned Lord Justice was merely stating his view of these cases in regard to the case then before the Court. He found, however, that in fact there was corroboration directly implicating the accused in the case then under appeal, and it was, therefore, unnecessary to consider further the cases of *Everest*, *Wilson*, and *Blatherwick*.

In *R.* v. *Cohen*, 10 Cr. App. R. 101, the Court did not attempt to deal with the difference of opinion manifested by the decisions of *Everest* and *Wilson*, but, as explained in *R.* v. *Willis*,

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12 Cr. App. R. 44, decided the case on the assumption that the more favourable view of the law to the appellant as laid down in *Everest's* case was right. The Court there said that it was the practice of this Court to require corroboration before it could allow a conviction to stand. We did not intend to lay down such a rule of practice. It is too strongly expressed and is too general a statement, the correct view is that laid down earlier in the present judgment.

The latest case is *R.* v. *Willis*, 12 Cr. App. R. 44 (1916). The Court there stated: "Certain statutes provide that certain classes of evidence shall not be sufficient to support a conviction unless corroborated by some other material evidence implicating the accused; but where corroboration is required by the common law it is not subject to any such qualification." It follows from the law laid down in the present judgment that that is a correct view to the effect that the verdict of a jury properly warned would not be set aside merely because they had believed an accomplice without corroboration implicating the accused, but it must not be read as meaning that the corroboration need not be independent evidence implicating the accused.

The case of *R.* v. *Cooper*, 10 Cr. App. R. 195, was referred to during the course of the argument. That case turned upon special facts relating to the medical testimony. It did not alter the law.

Now that we have stated the law to be applied in future cases, we trust that it will be unnecessary again to refer to the earlier decisions of this Court.

The question was discussed on the hearing of this appeal whether the evidence of an accomplice against two prisoners, corroborated as to one prisoner's participation in the crime, but not as to the other, can be regarded as corroboration with regard to both prisoners. We think the law is correctly stated by Alderson, B., in *Reg.* v. *Jenkins* (1845), 1 Cox C. C. p. 177. The learned Baron said: "Where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both it seems to me it would be unjust to give it a general effect." The case of *Rex* v. *Jones* (1809), 2 Campbell, p. 131. may appear at

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first sight to be in the contrary direction, but, upon closer examination, we do not think that Lord Ellenborough intended to decide more than that when two prisoners are tried and convicted upon the evidence of an accomplice corroborated as to the one but not as to the other, the conviction of the other must nevertheless be regarded as a conviction which was good in law. Lord Ellenborough was upholding the rule of law that a conviction founded upon the evidence of an accomplice only could not be treated as bad in law. His Lordship said: "Judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness."

We see no reason in principle why a different rule as to corroboration should apply to a prisoner tried with another, against whom there is corroborative evidence of the accomplice's story, from that applicable if the first prisoner had been tried alone. In that case the uncorroborated evidence of the accomplice would be admissible against him, but it would be the judge's duty to give the proper caution to the jury; and it would be equally incumbent upon the judge to give the warning to the jury when the prisoner is tried with another against whom there was corroboration of the accomplice's story. If the judge failed to give the warning, this Court would be bound to set aside the conviction. If the judge gave the warning, this Court would then have to consider all the circumstances of the case as already indicated.

The appeal stands dismissed.

Solicitor for the Appellant—*F. Freke Palmer*.

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Habitual Criminal.

A jury properly directed are entitled to find that a defendant who refuses to give any information about himself since a discharge from prison five months before the commission of the primary offence, is "leading persistently a dishonest or criminal life" within s. 10 (5) *of the Prevention of Crime Act*, 1908.

Appeal against sentence and application for leave to appeal against conviction.

Appellant, George Wilson, was convicted, on June 6th, at the London County Sessions, before the Deputy-Chairman, of horse-stealing, and was sentenced to three years' penal servitude. He was also convicted of being a habitual criminal, and was sentenced to five years' preventive detention on this charge. He now appealed against his sentence on the conviction for horse-stealing, and against his conviction on the charge of being a habitual criminal.

Appellant had been discharged from prison five months before he committed this offence of horse-stealing. On his arrest he was asked, in accordance with the practice of the police, whether he would give any information concerning work which he had done in the interval. He declined to do so. At the trial the prosecution proved against him the three convictions required by the statute—in 1905, for horse-stealing, when he was sentenced to three years' penal servitude; in 1908, for horse-stealing, when he was sentenced to four years' penal servitude; and in 1912, for horse-stealing, when he was sentenced to three years' penal servitude. A number of other convictions were then proved against

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him, shewing that altogether he had suffered some six convictions for horse-stealing, for which he had been sentenced to severe terms of punishment.

It was argued by counsel for the defence at the trial that the evidence that appellant had been discharged five months before the commission of the offence in this case, and that he had refused to give any information to the police concerning his occupation during the intervening time, was not sufficient evidence that he had been "leading persistently a dishonest or criminal life" up to the time of his arrest. His counsel declined to call evidence, but rested his defence to this charge upon this point of law.

Appellant now produced some evidence to shew how he had been occupied during this period of five months. He produced a letter from a lady to the effect that he had been in her employment for some time until two days before the commission of his present offence, first as a casual worker, and then as a regular man for about three weeks, and that during that time he had given satisfaction as a good worker.

Appellant in person.

W. A. Metcalfe for the Crown.

The LORD CHIEF JUSTICE: It is unnecessary to discuss the facts of the case, which disclosed a perfectly clear offence by the appellant. In view of his record it is impossible to say that the sentence of three years' penal servitude was excessive.

With regard to the conviction as a habitual criminal, the question turns upon that whether or not there was sufficient evidence before the jury of appellant having led "persistently a dishonest or criminal life" within the meaning of the statute.

It is quite clear on the authorities that the point of law taken on his behalf fails. In *Heard* (1911), 106 L. T. 304; 76 J. P. 232; 22 Cox, C. C. 725; 28 T. L. R. 154; 7 Cr. App. R. 80, Hamilton J. dealt with this class of case and the particular kind of defence set up.

This Court is of opinion that there was sufficient evidence for the case to be left to the jury with a proper direction on the question whether or not appellant had been leading persistently a dishonest or criminal life.

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The Deputy-Chairman's summing up was very careful, and is unimpeachable upon this point. He directed the jury that there had been a period of five months unaccounted for, except that appellant had refused to give any statement to the police and had given no evidence concerning his life during that time. The jury found a verdict of guilty, and their verdict cannot in law be attacked.

On appeal to this Court appellant has given some evidence of his life during the interval in question.

It is a pity that this evidence was not given at the trial, and more especially that appellant did not give the information to the police. This Court cannot, having regard to the course pursued at the trial and the material now before us, say that this conviction is wrong. No account is given of the conduct and life of appellant during the five months except the three, four, or perhaps five weeks when he was employed by the lady whose letter he produces. In the circumstances, we consider that we cannot interfere with the sentence. It must be borne in mind that this term of preventive detention need not be undergone by appellant *in toto* if he conducts himself properly. The object of this detention is to afford appellant an opportunity of reforming, and if he shews to those responsible a genuine desire to reform he will be released at a much earlier time than at the end of five years. For these reasons, therefore, the appeal fails.

Appeal dismissed.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE SCRUTTON, AND MR. JUSTICE ATKIN.

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On the true construction of 25 *Ed.* 3, *stat.* 5, *c.* 2, *the Statute of Treasons,* 1351, *to "be adherent to the King's enemies in his realm," the adherence need not be that of a person within the King's "realm"* (*a*).

Appeal against conviction on law.

The appellant, Roger David Casement, was, on June 26th, 27th, 28th, and 29th, 1916, tried in the King's Bench, before the Lord Chief Justice, Avory and Horridge JJ., upon a charge of high treason, and was, on June 29th, 1916, convicted and sentenced to death.

Presentment of the Grand Jury.

Sir Roger David Casement is charged with the following offence:—High treason by adhering to the King's enemies elsewhere than in the King's realm—to wit, in the Empire of Germany—contrary to the Treason Act, 1351 (25 Edw. 3, st. 5, c. 2).

Particulars of Offence.

Sir Roger David Casement, otherwise known as Sir Roger Casement, Knight, on the 1st day of December, 1914, and on divers other days thereafter and between that day and the 21st April, 1916, being then—to wit on the said several days—a British subject, and whilst on the said several days an open and public

(*a*) Cf. "these three words" [*in his realm*] "seem surplusage: *R.* v. *Lynch*, 20 Cox C. C. 477." Kenny, Outlines of Criminal Law, p. 269, n. 3 (6th edit.).

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war was being prosecuted and carried on by the German Emperor and his subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without this realm of England—to wit, in the Empire of Germany.

Overt Acts of the said Treason.

1. On or about the 31st day of December, 1914, soliciting and inciting and endeavouring to persuade certain persons, being British subjects and members of the military forces of our Lord the King and being prisoners of war then imprisoned at Limburg Lahn Camp in the Empire of Germany, to wit, Michael O'Connor and others whose names are unknown, to forsake their duty and allegiance to our Lord the King and to join the armed forces of his said enemies, and to fight against our Lord the King and his subjects in the said war.

2. On or about the 6th day of January, 1915, soliciting and inciting and endeavouring to persuade certain persons, being British subjects and members of the military forces of our Lord the King and being prisoners of war then imprisoned at Limburg Lahn Camp in the Empire of Germany, to wit, John Richardson and John Cronin and others whose names are unknown, to forsake their duty and allegiance to our Lord the King and to join the armed forces of his said enemies and to fight against our Lord the King and his subjects in the said war.

3. On or about the 19th day of February, 1915, soliciting and inciting and endeavouring to persuade certain persons, being British subjects and members of the military forces of our Lord the King and being prisoners of war then imprisoned at Limburg Lahn Camp in the Empire of Germany, to wit, John Robinson, William Egan, Daniel O'Brien, and James Wilson, and others whose names are unknown, to forsake their duty and allegiance to our Lord the King and to join the armed forces of his said enemies and to fight against our Lord the King and his subjects in the said war.

4. In or about the months of January and February, 1915, at Limburg Lahn in the Empire of Germany, circulating and dis-

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tributing and causing and procuring to be circulated and distributed to and amongst certain persons being British subjects and members of the military forces of our Lord the King and being prisoners of war imprisoned at Limburg Lahn Camp aforesaid, to wit, Michael O'Connor, John Robinson, John Cronin, William Egan, Daniel O'Brien, James Wilson, and divers others whose names are unknown, a certain leaflet to the tenor and effect following, that is to say—

> "IRISHMEN! Here is a chance for you to fight for Ireland. You have fought for England, your country's hereditary enemy. You have fought for Belgium in England's interest, though it was no more to you than the Fiji Islands! Are you willing to fight *for your own country* with a view to securing the national freedom of Ireland? . . .
>
> With the moral and material assistance of the German Government an Irish Brigade is being formed. The object of the Irish Brigade shall be to fight solely *the cause of Ireland*, and *in no circumstances* shall it be directed to any *German* end. The Irish Brigade shall be formed and shall fight under the Irish flag alone. The men shall wear a special distinctively Irish uniform and have Irish officers. The Irish Brigade shall be clothed, fed, and efficiently equipped with arms and ammunition by the German Government. It will be stationed near Berlin and be treated as guests of the German Government. At the end of the war the German Government undertakes to send each member of the Brigade who may so desire it to the United States of America with necessary means to land. The Irishmen in America are collecting money for the Brigade. Those men who do not join the Irish Brigade will be removed from Limburg and distributed among other camps. If interested see your company commanders. Join the Irish Brigade and win Ireland's independence! Remember Bachelor's Walk! God save Ireland!"

with intent to solicit, incite and persuade the said last-mentioned British subjects, being Irishmen, to forsake their duty and allegiance to our Lord the King and to aid and assist his enemies in the prosecution of the said war against our Lord the King and his subjects.

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5. On or about the 31st day of December, 1914, and on divers days thereafter in the months of January and February, 1915, persuading and procuring certain persons being members of the military forces of our Lord the King, to wit, Daniel Julian Bailey, one Quinless, one O'Callaghan, one Keogh, one Cavanagh, one Greer, and one Scanlan, and divers others whose names are unknown, to the number of about fifty, the said persons being prisoners of war then imprisoned in Limburg Lahn Camp in the Empire of Germany, to forsake their allegiance to our Lord the King and to join the armed forces of his said enemies with a view to fight against our Lord the King and his subjects in the said war.

6. On or about the 12th day of April, 1916, setting forth from the Empire of Germany as a member of a warlike and hostile expedition undertaken and equipped by the said enemies of our Lord the King, having for its object the introduction into and landing on the coast of Ireland of arms and ammunition intended for use in the prosecution of the said war by the said enemies against our Lord the King and his subjects.

I. The Statutes.

Sullivan (Serjeant and K.C. of the Irish Bar: *Artemus Jones* and *J. H. Morgan* with him) for the appellant. The Treason Act, 1351, provides that, "if a man . . . be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, . . . that ought to be judged treason which extends to our Lord the King and his royal majesty."

This appeal will involve two questions: (1) Whether the matter described in the charge is in truth an offence under the Treason Act, 1351; and (2) Whether the definition of the offence of "adhering" given by the Lord Chief Justice at the trial was an accurate definition or was a defective direction to the jury.

The Treason Act, 1351, was, it is submitted, passed to limit the effect of the legal decisions which were then extending the doctrine of treason. The Act dealt only with those treasons which at the time of its passing were triable at common law, and there is ample authority that it was declaratory of the common law. Even with the most extended construction of the common law then prevalent, which the Act was passed to prune and not to enlarge, in no circumstances could there have been such a crime as that described in the indictment to this case, namely, adherence to

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the King's enemies elsewhere than in the King's dominions. Had it passed yesterday, the charge here would not be an offence under it. The text-books are responsible for the error in construing it.

The source of that error, I hope to show, will be found in view of the statutory development of the law of treason, a development which continued through a great number of statutes and over a great many years, and which displayed an extraordinary history of extension and contraction, and I shall submit that it is clear that the Treason Act, 1351, did not in any degree purport to legislate for any territory outside the King's dominions. The applicability of the law of treason was extended beyond the realm and the dominions by *special* statutes which in due course have disappeared. Nothing, therefore, remains in this case but the statute.

First note the recital: "divers opinions have been before this time in what case treason shall be said and in what not." In 1351, there were at least four different codes of law in England, some of which extended far beyond this country. The common law, however, was, I submit, purely local, and in its essence was dependent upon *venue*. It could not then (though statutes later did) have cognisance of anything not arising within the body of some county. It was incapable of informing itself of a transgression which had taken place wholly without the body of any county which was the foundation of the jurisdiction of the common law.

The first kind of treason to be recognised by law was compassing or imagining the death of the Sovereign. In 1285 there is on record a case (*a*) of "adhering," and there are seven or eight other cases in the reports—all of the same type. For in all these cases the facts shewed that defendant had utilised his position within the realm and the King's peace to aid the enemies of the King, who were sometimes inside, but more often outside the realm, by sending them information, perhaps even material aid. But the offender is always *within the realm*.

The reason why adherence to the King's enemies (and levying war) abroad was not made a treason is clear. In the fourteenth

(*a*) *Nicholaus de Wautham:* see Pollock and Maitland, History of English Law (2nd edit.), Vol. II., p. 507, citing *Oxford City Documents*, 204.

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century a number of nobles had lands both in England and in France, and owed allegiance to the Crowns of both countries. They were bound, under pain of forfeiture of their estates in France, to render military service to the Kings of France: 1 Poll. & Mait. 460. If they did so, and if adherence to the King's enemies outside the realm was a treason, their English possessions were liable to forfeit by reason of their crime. In most cases such nobles would be members of the English legislature, and there would be a very cogent reason for Parliament to be careful to ensure that they should not be put in the position of having to choose which of their territories—French or English—they should forfeit if their feudal lords disagreed and went to war. Treason largely affected real property, and, indeed, early developed as part of the law thereof. The distinction between treason and felony affected the question, who was to have the lands. Hence the limitation "within the realm" in "levying war," and in "adhering." Levying war was certainly confined to "within the realm" (except in one statute only, and that for a brief period, viz., 13 Charles 2, c. 1). And if actually taking up arms was so limited, why not mere "adherence"?

The foundation of the common law was *venue:* at common law both before and after the statute, process was everything—the essence of it. The Act of 1351 is silent on all questions of procedure, and when it comes to be extended—as it was periodically to operate outside the realm—questions of procedure have always been dealt with. In criminal matters *venue* is always attended to when there is a statutory enlargement of offences by acts committed outside the realm or the body of a county. If, then, the statute was intended to operate on offences committed outside the kingdom, how was it to be put into execution? (Counsel referred on the point of *venue* to the Constitutions of Clarendon, 1164; the statute 35 Hen. 8, c. 2; and Viner's Abridgment, Vol. 14, p. 376, and Vol. 21, pp. 3 and 130.) At any rate, till a statute of Edw. I. there was no venue applicable for trial of a crime entirely "beyond sea," or committed partly abroad and partly in England, or begun in one county and completed in another, and *venue* was the very essence of trial.

[DARLING J.: The statute enabling trial in either county may have declared the common law.]

It was essential before enquiry could be made into a matter that it should have taken place within a county: Viner's Abridgment, Vol. 21, p. 178. These anomalies were all redressed by statute. I rely most strongly on the fact that the statutes (conscious of the incompetence of the common law), when they provided that acts committed outside the dominions should be crimes provided statutory tribunals to deal with them: *e.g.*, 26 Hen. 8 (explained by 36 Hen. 8). See also Viner's Abridgment, Vol. 21, p. 180.

In Hale's Pleas of the Crown (Lond. 1800), Vol. I. pp. 154, 155, there is a reference to *John Kynaston* (1400); the case is unprinted: it is in the Record Office, Coram Rege Roll, Easter, 2 Hen. 4, membrane 18; the accused was charged with being an accessory to the treason of Owen Glyndoor and other Welshmen in compassing, imagining, &c. the death and deposition of the King and of the Prince of Wales, and of traitorously sending his son to help Glyndoor, and of comforting two Welsh traitors. He was also charged with felonies—stealing cattle in Shropshire. He was indicted in Shropshire, but tried in the King's Bench at Westminster. The treasons were alleged to have been committed *only* in Wales, which was perhaps within the realm, but was not in the body of any county, and it appeared that a plea to the jurisdiction was allowed and that Kynaston was tried upon the charge of stealing alone and acquitted. The Attorney-General admitted that the King's judges in Shropshire could not enquire into treasons in Wales, nor were they triable by the laws of England, and the jury—from Shropshire—were only asked to try the felonies in Shropshire. (A copy of the record was handed to the Court.) Wales is alleged in the plea to be "outside": it was in an anomalous position—part of the realm, but not in the body of a county. It is all the stronger for me if it was part of the realm. The defect was afterwards cured by statute. At this time the King's writ did not run in Wales, as was recognised by a later statute: 26 Hen. 8. See Hale.

[DARLING J.: Hale distinctly states that treason in Wales would be tried in Wales by a special commission from the King of England.]

By statute—2 Hen. 5, c. 6—that is my point. Both com-

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missioners and *venues* are statutory. Nothing is treason unless it can be so adjudicated. A common law commission would be one of oyer and terminer.

[LAWRENCE J.: The King could always issue a commission at common law.]

There were a number of subsequent statutes which provided that acts committed abroad should be treason. In every one machinery for the trial of offenders was provided. The only possible inference is that before the enactment of the sections creating this machinery there was no way in which persons committing acts abroad could be tried. And where there is no punishment there can be no crime. It could never have been treason for a person to do that for which no tribunal could punish him.

(On this point counsel referred *seriatim* to the statutes 2 Hen. 5, c. 6; 26 Hen. 8, c. 13—the foundation of all that Hale and Coke say about procedure and treason out of the realm; 28 Hen. 8, c. 15; 32 Hen. 8, c. 4—of which, perhaps, Hale was thinking; 35 Hen. 8, c. 2; 5 & 6 Edw. 6, c. 11; 1 Mary, sess. 1; 1 & 2 Ph. & M. c. 10; 13 Ch. 2, st. 1, c. 1; 9 Wm. 3, c. 1; 13 [and 14] Wm. 3, c. 3; 1 Anne, st. 2, cc. 20, 21 (otherwise 16, 17); 3 & 4 Anne, c. (13 or) 14; 7 Anne, c. 4; 7 Anne, c. 21.) Counsel read s. 3 of 26 Hen. 8, c. 13.

Before 26 Hen. 8, c. 13, there was no tribunal to try offences committed within the territory of any foreign prince. The admiral had civil law jurisdiction extending over all navigable waters, and the constable and the marshal had some jurisdiction in respect of outside treasons, but notwithstanding 26 Hen. 8, the common law had no such jurisdiction: another statute was required to give it.

If the King had power to appoint a commission overriding the law of *venue*, you would not want 2 Hen. 5, c. 6, or 26 Hen. 8 or 35 Hen. 8. By 28 Hen. 8, c. 15, you get a trial according to common law (before the admiral and commissioners) of offences committed within the jurisdiction of the admiral. Though it is not a common law but a statutory tribunal, it must proceed on common law lines, and so the statute provides a *venue*—a very strong authority. I submit that without *venue*, even at that date, common law had no jurisdiction in crime, as you could not

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summon a jury from the true *venue*. 35 Hen. 8 shews that 26 Hen. 8 had created difficulty in procedure. In 35 Hen. 8, the common law for the first time is enabled to try acts committed abroad. If there were such things as common law commissions, they would have been discovered by this time.

Replying to an observation of the Court, counsel said that when he dealt with the authority of Coke, he would shew that, especially in treason, he had been severely criticised by Prynne, Pulton, Keeling, Stephens, and many historians.

My argument is that 26 Hen. 8 created *foreign* treason, but as trial by special commission proved unworkable, 35 Hen. 8 provided for the first time that *foreign* treason should be tried by common law. That statute was confirmed by 5 & 6 Edw. 6, c. 11.

[ATKIN J.: I suggest that the procedure here—and in 26 Hen. 8—is rather for presentment than for trial.]

It was the want of procedure in 26 Hen. 8 that produced 35 Hen. 8. The 1 Mary, sess. 1, swept away all statutory treasons and restored 25 Edw. 3; 1 & 2 P. & M. c. 10 makes all treason trials proceed according to common law; 13 Ch. 2, c. 1 *alone* makes levying war within *or without* the realm treason. The Williamite statutes deal with war outside, but in a somewhat different manner; a fictitious *venue* is introduced—"any county." 9 Will. 3, c. 1, created, I submit, new treasons. I agree (with Lawrence J.) that in 35 Hen. 8, "before the King's Justices of his Bench for Pleas . . . where the said Bench shall sit and be kept," probably means Middlesex. Then two statutes of Anne refer to soldiers, and one to the trial of Scotsmen—only notable for the caution in providing a *venue* dealing with an outside crime.

Again and again the statutes have gone back to 25 Edw. 3, by clearing out all what I might call fancy treasons from time to time.

II. The text-books.

The idea that adhering to the King's enemies constituted a treason even when it took place out of the realm can be traced to Coke. The text-writers in dealing with these matters were in error. In 3 Institutes, 4, he says, on the 1351 statute: "The fourth [treason] is adhering to the King's enemies within the realme, or without, and declaring the same by some overt act."

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But Coke is inaccurate. He says, *ib.*: "The third is levying war against the King," disregarding the words "in his realm." Except by the statute 13 Ch. 2, c. 1, the treason of levying war against the King has always been limited to commission within the realm. Again, at p. 10 (note 15), Coke misquotes the statute, omitting the words "in his realm" where they first occur, *i.e.*, after "adhering to the King's enemies."

[DARLING J.: My brother Atkin and I have read the original statute in Norman French at the Record Office, and compared it with the Parliament Roll of the same date, but probably written rather before it; we carefully observed the writing and the punctuation, if that is worth anything. The authorities there treat the two as contemporary.]

(The learned Serjeant went *seriatim* through the discrepancies between the printed statute and Coke's citations of it in his notes thereon.) In his dissertation which follows he gives to the statute exactly the meaning it would have if those words were omitted. But it is because the statute includes those words that it is perfectly plain, and I submit first and last that the Court must read the statute, and say whether on a first reading its meaning is not perfectly clear. If it is, that is its meaning. The cases which Coke cites of the delivering of castles are cases, I submit, not at common law at all, but within the jurisdiction of the constable and marshal, which was not limited by any question of *venue* or by the rules of the common law. Those cases, therefore, afford no difficulty.

[ATKIN J.: You could not appeal a man for a crime committed abroad before the constable and marshal, unless it was a crime.]

It is not a crime in the sense in which we are dealing with it, namely, within the Act of 1351, for that refers to the King's Court administering the common law within the realm. Here I say defendant is indicted for an offence against the 1351 statute, and the matter alleged is not one within it.

[LAWRENCE J.: You read the word "elsewhere" out of the statute.]

No; the aid and comfort may be given "elsewhere."

[DARLING J. cited New Hampshire. See the judgment, below.]

With regard to Coke's authorities, 43 *Lib. Assis.* 28, 29 (*a*), have no reference at all to the statute. The Rolls of Parliament, 7 Rich. 2; 15, 17, and 24; and 7 Hen. 4; 47, and others, have nothing to do with treason at all. Fitzherbert's Abridgement, 5 Rich. 2, "Triall" 54, was cited below as authority for the proposition in Coke that a person who committed treason abroad might be tried in England wherever his land was ["if a man be adherent to the King's enemies in France, his land is forfeitable, his adherence will be tried where his land is, as has often been done with the adherents of the King's enemies in Scotland"]. The quotation is taken from the argument of counsel, but when Hale's and especially Hawkins's works are perused it is quite clear that great doubt existed in this matter and no one knew how such a person could be tried: Hawkins in effect confesses that this was so. The statement to be found when Coke is dealing with piracy (at p. 113) is inconsistent with what he says on pp. 3 and 10: "treason (out of the realm) . . . at the making of 26 Hen. 8 wanted trial . . . at the common law": *i.e.*, there was no process to bring defendant before a court.

In the Year Book, 8 Edw. 3, fol. 20, pl. 6, inasmuch as the accused adhered to the Scots by marching into Northumberland, he was not only within the King's dominions during the time of the commission of the offence, but actually within the King's realm. The case is, therefore, not an authority against appellant. Counsel referred to other cases in Coke before 1351.

The authorities quoted by Hale in his Pleas of the Crown, Vol. I. p. 167, are before the passing of the statute and can have no bearing upon the construction of it. At p. 169 he follows Coke, who, I have submitted, was wrong. Hawkins, in his Pleas of the Crown, B. 2, c. 25, s. 48 [Vol. IV. p. 22, edn. Leach], Vol. II. p. 306 (edn. Curwood), says: "It seems to have been a great doubt before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried . . . but surely it cannot reasonably be doubted, but that it was triable some way or other." The author views

(*a*) "42 Ass. 29" in margin is a misprint: omit "42 Ass."

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the matter through the wrong end of the telescope, with all respect: he is really strong authority for me. He says that being a crime it surely must be punishable, whereas the development of the criminal law shews that it is by reason of being punishable that acts become crimes. It is submitted that the speculative opinions of text-writers—not contemporaries—cannot control the construction of a statute passed in 1351, which as far as research can shew was not acted on or construed by judgment after argument until 1903. The statute is its own prime expositor. They were all in this difficulty—how did something entirely outside the King's dominions come to be a crime? and all they can find is "Triall, 5 Rich. 2, 54" [above], which we know is an observation of counsel arguing. 26 Hen. 8 made treason acts committed abroad, 35 Hen. 8 says you may indict the offender here. Such acts as were treason under 25 Edw. 3, under the statute of Hen. 8 were treasonable wherever they were committed. "Compassing," being unlimited, might take place anywhere, but being adherent is an offence, which is a state of mind existing in the individual, and the extent of the jurisdiction given by the statute was that you might enquire into his state of mind in the light of events either within or without the realm, *i.e.*, the "aid or comfort" he might have given—the evidence of his adherence—need not be aid and comfort in the place where he is in fact adhering within the realm, but might be rendered to the enemy outside the realm; "elsewhere" applies to the aid and comfort—the overt act by which you prove the adhering. If he is in the realm and "adhering," he is, being within the King's peace, giving aid and comfort to the enemies elsewhere: it is the underlying treachery; his being within the realm enables him to get the information or the material useful to them, although they may not be within the realm, and his adherence and work may not be manifested therein. The offence is within, and to prove it, you may have to shew events taking place without. But the man must be inside. It is his action, his state of mind, his treachery.

In all the reported cases, the overt acts have been of persons within the realm, *e.g.*, collecting information about the King's ships, army, &c.

[SCRUTTON J.: May "adhering" within the realm be proved by overt acts entirely elsewhere?]

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Yes. But defendant must be within; adherence is a matter personal to the offender: *Weldon* [below, p. 112].

[BRAY J.: If the indictment here had been for adhering within the realm, that could have been proved by the acts he did in Germany.]

If he was within the realm, you might prove by acts in Germany that even though he had never been there at all, he was guilty of "adhering." Suppose he sends information—what was done in this country might not be manifest within this country at all. The overt act may be proved by the receipt outside the realm of information. *Mulcahy*, L. R. 3 H. L. 306 (1868), who was convicted of treason-felony in Dublin had never been within 3,000 miles of Dublin at the time the acts were committed: his agent had done them; defendant was convicted of "compassing," not "adhering"; the overt act was conspiracy—a peculiar case. You might have an overt act of adherence *without* where there was none within. Suppose defendant in America appoints an agent to do certain acts in Germany, with German assistance, then comes and remains in the realm; he is within and his agent is acting without: he does nothing within. If *Mulcahy* is right, you may prove the acts of his agent to shew his "adhering" while within the realm. "Giving aid and comfort in the realm or elsewhere" is, I submit, a description of the nature of the adherency.

[DARLING J.: Are not the words "giving . . . comfort" in apposition to "adhering"?]

Yes, they are descriptive of the adherence, but it would do violence to the context to read them as: "if a man be adherent to the King's enemies in his realm by giving, &c., in his realm, or if he be adherent . . . elsewhere by giving them . . . comfort elsewhere."

[DARLING J. referred at length to the textual discrepancies between the Statute Roll and the Parliamentary Roll: the former is printed exactly in the Revised Statutes.]

You ought not to draw any inference from punctuation, and if

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crime or no crime depends upon it, it should be read in favour of the accused.

Till 1903 [*Lynch*] there was no argument or judgment on these words: the nine cases of adherency were all within the realm: communications, information, &c. collected within or attempts to communicate with enemies outside. You must get rid of "in his realm," as Coke does, to arrive at his view. But the Court cannot omit them. If you admit "giving . . . comfort" is adjectival or in apposition to "adhering," then to read "by adhering to the King's enemies within his realm, in the realm or elsewhere" you have a repetition which is superfluous and unmeaning. To avoid that you must take "adhering" to be clearly defined as "being within the realm."

In the case of levying war the limitation "in his realm" is perfectly clear; is adherency to be wider? If a man does not take up arms, he is short of levying war, but according to Coke, he who takes up arms *outside* is not guilty, but if he gives information to others who are in arms he is guilty of high treason. No later statute deals with adhering, and the ruling on it in *Lynch* is not, I submit, sound.

[SCRUTTON J. referred to the *Duke of Wharton's* case in 1729.]

Wharton was outlawry. Had he stood his trial, I submit that he had a perfect legal objection to the indictment. At the trial in Ireland, *Weldon*, 26 St. Tr. 226 (1795), the opinion was expressed, *per* Finucane J., at 292, that "adherent to the King's enemies within the realm" meant that the offender must be within the realm. It is not as if the law had been acted upon in the way expressed by the text writers through a number of years. That would naturally influence the Court to a very great degree. As the matter did not arise, the observations even of the greatest lawyers are of far less authority.

[BRAY J.: The words of Hawkins are "expressly within the purview of 25 Edw. 3"; he clearly thought the offence provided for there. At any rate, the statute of 8 Hen. made it triable.]

IV. Subsequent Statutes.

The learned Serjeant then referred at length to the marshal's jurisdiction under 13 Rich. 2, c. 2, and 11 Hen. 4, c. 14.

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[DARLING J. cited *Pulton:* see the judgment below.]

In *Cundell's* and *Smith's* case, in 1812, 4 Newgate Calendar, 62 [1828], the only case before *Lynch*, [1903] 1 K. B. 444; 72 L. J. K. B. 167; 88 L. T. 26; 51 W. R. 619; 67 J. P. 41; 20 Cox, C. C. 468; 19 T. L. R. 163, in which apparently the question was whether treason by adherence to the King's enemies could be committed out of the realm, the accused was in His Majesty's service, and was, in fact, guilty of treason under the second Mutiny Act (*b*) of Anne. *Apropos* of Hawkins's remark above, in 2 Dyer, 131 b, case 75 (2 & 3 P. & M.), the judges and serjeants gave as their view (*not* decision in form, but with the authority of one), that "no offence of treason committed out of the realm was triable here by the course of the common law." That memorandum, therefore, supports this argument and practically contradicts the views expressed by Coke, Hale, and Hawkins.

[ATKIN J. referred to unrepealed 5 & 6 Edw. 6, c. 11, s. 6.]

The book of treason statutes compiled by the judges by order of Parliament (1709) states that it is repealed.

My argument must not be taken to deny that there was a great distinction between the King's realm and his dominions—or that within the King's dominions the King's law ran, or that Parliament might legislate for the King's dominions, or that the legislation of Parliament would be administered in the King's dominions, although perhaps they were outside the King's realm of England, which was a much more circumscribed geographical locality. In Gascony, Ireland, Wales, and Scotland there was no common law; the law was administered by commissioners appointed *ad hoc*. Some offences under the Treason Act, 1351, *e.g.*, compassing, were vicious and treasonable *per se*, and might be committed in the King's dominions without the realm which would be triable by the King's laws as administered in his dominions outside the realm: but others only acquired their criminality if committed in a particular part—viz., the realm.

The Commissions to try crime alluded to were protested against by Parliament just because they were not according to common,

(*b*) Apparently (repealed) 2 & 3 Ann. c. 17 (otherwise 20).

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but civil, law, and many were abolished by the Petition of Right.

In *Platt* (1777), 1 Leach, 157 (treason at Savannah), the Court (at p. 168) expressed the view—it is only a dictum—that treason by adherence to the King's enemies might be tried before the statute 35 Hen. 8, c. 2, by the rules of the common law though the *aid and comfort* was afforded without the realm—"it was the ancient opinion." This case affirms my contention: this one particular act might be tried within though the aid, &c. was without. But the presence of the accused person within the realm at the time of the commission of the offence was clearly contemplated; the emphasis is—aid, &c. might be given outside. The ancient opinion says that *adhering* was an exception to the rule; it got over the ancient rigidity: the law developed, and if part of the transaction had a *venue*, that gave you sufficient seisin of the whole; so Viner (above). That defendant must be in the realm is implied by the emphasis that he could be tried by common law, though the aid, &c. was without the realm. The peculiarity of "adhering" is that the Court may investigate an overt act not within the jurisdiction.

[ATKIN J.: I think that case supports you on the point that you could not at common law try a treason out of the realm because of the difficulty about *venue;* it leaves open whether there was an offence, if you could find how to try it.]

The peculiarity of treason by adherence was that it could be punished at common law, though *completion* of the crime could not be proved under the old law of *venue*. In all cases before 1903 the traitor was within the realm, the enemy outside. In 1903 was the case of *Lynch*. The question whether adherence to the King's enemies outside the realm constituted treason was there for the first time argued: the report, [1903] 1 K. B. 444, does not touch this point. The shorthand note of the proceedings (p. 109) shews that there was no judicial pronouncement upon the argument touching the matters in question here, but the case was allowed to proceed to the jury notwithstanding the objection made on behalf of the prisoner that no offence was shewn by the indictment. Lord Alverstone based his decision upon *Vaughan* (1696), *Holt* 689; 13 St. Trials, 486; 3 Salk. 634, stating that that case was a complete authority against the proposition I am

contending for here. The Court below was satisfied that on this point *Vaughan* was not against me, but approved of *Lynch;* if *Lynch* was based partly on *Vaughan* and partly on 18 Geo. 2, c. 30, it is no authority, I submit, against me. *Vaughan* was plainly a case of adherence to the King's enemies *within* the realm, as the "narrow seas" were within the realm of England. It was tried by the Admiral within the Admiralty jurisdiction under the statute 28 Hen. 8, c. 15 (dealing with treasons committed in Admiralty jurisdiction), as the offence had not been committed within the body of a county, and was not tried as a *foreign* treason by the King's Bench under the statute 35 Hen. 8, c. 2 (dealing with *venue* for treasons committed abroad). The decision in *Vaughan* cannot, therefore, affect the case for appellant, and as *Lynch* was founded upon it *Lynch* cannot be allowed any weight by the Court. It is true that other authorities were quoted in *Lynch*, but they were referred to by the Crown when the Lord Chief Justice had stated that it had no case to meet, but that the Court would listen to any further authorities it cared to produce. *Sir John Perrott's* case, 1 St. Tr. 1315 (1592), then mentioned, does not help us, and the statute 18 Geo. 2 is clearly irrelevant.

[DARLING J.: The Court in *Lynch* did not rely wholly on *Vaughan*.]

If the authorities I have dealt with are bad, *Lynch* would be bad and overruled.

[DARLING J.: Yes.]

To sum up. It is submitted that, dealing with the common law of the realm, developing out of the administration of the bodies of counties, there could not have been something alleged to be a crime, the existence of which could not be enquired into or determined by any legal tribunal. If no legal tribunal can inform itself whether or not an act has been done, the act cannot be said to constitute a crime. For want of *venue* the common law could never inform itself of a matter which had arisen outside the body of a county. The administration of the Treason Act, 1351 (although the law in all the King's dominions

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as far as we are dealing with it), would depend on the powers of the common law to inform itself of the facts alleged against supposed offenders. The statute, therefore, when dealing with matters within the realm, should not be construed as intending the creation of an offence which could not be tried. It must be borne in mind that the statute would fall to the ground so far as it was incapable of working itself out by the process and procedure of the common law. It is submitted that, on the plain reading of the statute, adherence to the King's enemies has only the criminal element of treachery if it is committed within the realm. It had the peculiarity that it might be proved to be committed within the realm although the completion of the offence might have taken place without the realm if the offender was within all the time; this distinguished it from the other matters alleged in the statute. It is outside the jurisdiction of the Court to try and make the case fit in with the speculative opinions of text-writers; the statute should be expounded by each member of the Court for himself and an independent opinion formed of its meaning. There can be found no effort to put into operation an allegation of treason committed without the realm until after the statute 26 Hen. 8 had constituted such an offence. In all the hundreds of years until 1903, including the time when there were pretenders in France leaguing against the Kings of England, there is, apart from *Cundell's* case, no precedent of any proceeding in the nature of "adhering" where the alleged adherent is, and all the acts and circumstances take place, entirely without the jurisdiction. It has been submitted that this Court should place no authority on *Lynch*, until which the matter is never debated by judges. There is no contemporaneous exposition. For these reasons it is submitted that the Court must construe the Treason Act, 1351, untrammelled by authorities or the views of text-writers.

DARLING J.: There are other points raised in the notice of appeal. Are they relied upon ?

Sullivan. I do not think I should be justified in occupying the time of the Court by asking that the conviction of appellant be reversed on those grounds, whatever criticism might be made of the matters involved.

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The Court retired to consider their judgment.

The Att.-Gen. (*Sir Frederick Smith, K.C.*: with him *the Solr.-Gen.* (*Sir Geo. Cave, K.C.*), *Bodkin, Travers-Humphreys,* and *Branson*) was not called upon to argue.

DARLING J.: Appellant was indicted for high treason by adhering to the King's enemies elsewhere than in the King's realm, that is to say, within the Empire of Germany. What he did is alleged to have been contrary to the Treason Act, 1351. That Act, as has often been stated, in defining the treasons therein was declaratory of the common law. It provided that it should be treason if a man were "adherent to the King's enemies in his Realm, giving to them aid and comfort in the realm, or elsewhere." It is the construction of these few words which has given rise to the argument that has been addressed to the Court before which appellant was tried and also before this Court.

We desire to say that we are greatly indebted to Serjeant Sullivan. We wish to say that in our judgment his argument was exceedingly well considered and well delivered, and was in every way worthy of the greatest traditions of the King's Courts. It was from no want of respect to his argument that we have not called upon the Attorney-General. The Court has considered fully Serjeant Sullivan's argument and the authorities he has advanced for it and has come to the conclusion that there is no need to call upon counsel for the Crown. The authorities have been fully cited. There is no consideration which is not before the Court, for an answer to Serjeant Sullivan's argument was made at the trial, and he was fully aware of what might be said in reply to any propositions he might advance. The Court, in considering his argument, has had the advantage of knowing what occurred at the trial.

The main point made by Serjeant Sullivan was that the Treason Act, 1351, neither created, nor declared that it was an offence to be adherent to the King's enemies beyond the realm. He maintained that the giving of aid and comfort *ou par aillours*, that is, outside the realm did not constitute a treason which could be tried in this country unless the person who gave the aid and comfort outside the realm, in the present case within the Empire

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of Germany, was himself within the realm at the time when he gave the aid and comfort. The argument was founded upon the difficulties which must arise through the doctrine of *venue* that the trial of accused persons must take place within certain districts where the *venue* could be alleged. It has been argued that, as a man who committed a crime in one county could only be indicted and tried for it in that county, if he committed a crime against the King he must be tried within the realm, and if the aid and comfort were given outside the realm by him while he himself was outside the realm he could not be so tried. That, it was said, followed from the fact that the whole transaction was outside the King's realm, and it was argued that the accused could not be tried in the King's Courts at all unless when he gave the aid and comfort outside the realm he was himself actually resident within the realm.

It is, no doubt, very difficult to find in the books a case where a man has been tried for aiding and comforting the King's enemies without the realm while he himself was outside the realm, because it cannot be a common offence. If a man did such a thing it is highly improbable that he would afterwards put himself in peril by coming within the realm, where what he had done could be investigated and where he could be punished. But if any person did do such a thing besides the giving aid and comfort outside the realm he would probably do something inside the realm. Probably he would come back with some evil intention, such as to levy war against the King. He would then be arrested in this country and charged, not with being adherent to the King's enemies outside the realm, but with some offence committed within the realm. It would be an offence much more easily proved, and anyone having the direction of a criminal prosecution in such a case would probably charge him therewith. The Court is not, therefore, greatly impressed by the fact that there is very little precedent for a prosecution such as the one before us.

There is, however, a very large amount of authority for the proposition that what the jury have found in this case, and what it has not been contested has been done by appellant—for there is no appeal here on the facts—constituted an offence triable in the King's Bench as this offence has been tried. The words of the statute of 1351 themselves shew that the construction contended for by Serjeant Sullivan is not a true one.

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We agree that a person who, while within this country, gives aid and comfort to the King's enemies in this country is adhering to the King's enemies. We agree that a person who, while within this kingdom, gives aid and comfort to the King's enemies inside or outside this kingdom is adhering to the King's enemies. But we think that there is another offence, and that the words of the statute mean more than what I have just referred to. In our view the words "giving aid and comfort" to the King's enemies are words in apposition to explain what is meant by being "adherent to the King's enemies." We are of opinion that if a man be adherent to the King's enemies in his realm by giving to them aid and comfort in his realm, or if he be adherent to the King's enemies elsewhere, that is, by giving to them aid and comfort elsewhere, he is equally adherent to the King's enemies, and if he is so adherent to the King's enemies he commits a treason under the statute. Reasons may be given for that state of the law. But the Court thinks that a very good reason is that the subjects of the King owe him allegiance, an allegiance which everywhere follows the person of the subject. He is the King's liege wherever he may be. He may violate his allegiance in a foreign country just as well as he may in England. A really shocking instance of what violation of that allegiance may mean is to be found in *Cundell's* case, where prisoners of war detained in the Isle of France were seduced from their allegiance and were led to adhere to the King's enemies. They were recaptured and were tried in England, one of them—Cundell—being executed for high treason. The accused man had violated his allegiance which had followed him and remained with him wherever he might be outside the King's dominions, and by which he was bound even when he was a prisoner of war. I do not cite that case in order to commend it for its humanity, but merely to shew what the strict law is. The case is perfectly good law. The only reason that it is not completely decisive here is because it does not settle where or how the trial should take place.

It is the opinion of the Court that there is a great deal of authority for the proposition that adherence to the King's enemies outside the King's dominions by a person who is himself outside the King's dominions constitutes treason. It is worth while to notice that the question how such an offence could be tried must have been discussed by many lawyers. There is a long and

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ancient opinion that it was treason to do what the appellant has been convicted of.

The statute 35 Hen. 8, c. 2, was passed "for the Trial of Treasons committed out of the King's Dominions." The only question dealt with was how such treasons were to be tried. Under this statute the present trial was rightly had in the King's Bench, provided that what was done by appellant amounted to treason under the Act of 1351. If it was such a treason, it was rightly tried. Whether it was or not depends upon the construction which we ourselves, reading this statute, put upon it. Serjeant Sullivan has asked us simply to take the statute and read it as though we saw it for the first time. It is a little difficult for any judge of the King's Bench Division to try to read the Statute of Treasons as if for the first time. He must have read it before. I do not, however, know that the rule laid down by Serjeant Sullivan is altogether acceptable. In Maxwell on the Interpretation of Statutes (5th ed. (1912), c. 11, at p. 490) the learned author says: "the long acquiescence of the legislature in the interpretation put upon its [a statute's] enactment by notorious practice may, perhaps, be regarded as some sanction and approval of it." The Treason Act, 1351, has been understood long ago and by lawyers of great learning and exceptional erudition, including members of the King's Bench. It has been understood in the sense which this Court now understands it. Their authority has been attacked by Serjeant Sullivan. He has—quite properly—attacked the authority of Lord Coke and questioned the reasons given for the statements made by that great lawyer. If we were to accede to the Serjeant's argument we should be bound to disregard the opinions of Lord Coke, of Sir Matthew Hale, and of Mr. Serjeant Hawkins, all great names in the law and persons whose opinions have long been followed upon many questions of extreme difficulty. Let us see what Sir Matthew Hale says. In his Pleas of the Crown, V. I. c. 15, at p. 169, we find:—

> "Touching the trial of foreign treason, *viz.*, adhering to the king's enemies, as also for compassing the king's death without the kingdom at this day, the statute of 35 Hen. 8, c. 2, hath sufficiently provided for it: P. 13 Eliz.; Dyer, 298, 300, *Story's* case; but at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any": 5 R. 2, Trial 54.

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That is a very definite statement, and if we were to allow this appeal we should be bound to say that it did not state the law. Are we entitled to throw over the opinion of Sir Matthew Hale so cavalierly? How comes it to be in our hands? At the commencement of the work there is this note:—

Extract from the Journal of the House of Commons.

Lunae 29° die Novemb. 1680.

ORDERED, That the executors of *Sir Matthew Hale*, late Lord Chief Justice of the Court of King's Bench, be desired to print the MSS. relating to the Crown-law; and that a Committee be appointed to take care in printing thereof, . . .

It is, then, because of their care and by order of Parliament that we have this book before us.

In Hawkins's Pleas of the Crown, B. 2, c. 25, s. 48, the learned author says: "It seems to have been a great doubt before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried. For some seem to have holden, that it was triable only upon an appeal before the constable and marshal; others, that it might be tried upon an indictment, laying the offence in any county where the king pleased; and others, that it was triable by way of indictment in that county only wherein the offender had lands: but surely it cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25 Edw. 3, should be wholly dispunishable, as it must have been, if it were no way triable." Serjeant Sullivan's argument is that it was dispunishable because you could not try it, if the kind of treason alleged were what is alleged in this case.

The following passage, already read, is worth mentioning again, because the Court is confessedly relying upon the opinions of Coke, Hale, and Hawkins in this judgment. In *Butt* v. *Conant* (1820), 1 Bro. & B. at 570; 4 Moore, 195; Gow, 84; 21 R. R. 716, Dallas C.J., himself no mean authority, said: "We are told that we must look to the authorities, and find what we can in the books upon the subject. Now if the authority of Lord Hale, and that of Mr. Serjeant Hawkins, are to be treated lightly, we

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may be without any authority whatever. With respect to Lord Hale, it is needless to remind those whom I am now addressing, of the general character for learning and legal knowledge of that person, of whom it was said, that what was not known by him, was not known by any other person who preceded or followed him; and, that what he knew, he knew better than any other person who preceded or followed him. With respect to Mr. Serjeant Hawkins, we know his authority. These are books which are in the hand and head of every lawyer, and constantly referred to on every occasion of this sort. I must, therefore, look to these books; and I shall proceed to examine the exposition given by text-writers of the words of those statutes, and the commission of the peace."

Lord Coke's opinion is precisely the same as that of Sir Matthew Hale and Mr. Serjeant Hawkins. It has been said that we ought not to adopt Lord Coke's view, because Stephen in his Commentaries and other writers have spoken lightly of the authority and learning of Lord Coke. It may be that they have done so. They were his successors. They had the advantage of living at a later period of history. Had he still been living perhaps they would have regretted that they had entered into argument with him. Lord Coke has been recognised as a great authority in this Court for centuries, and perhaps in no case more so than in the following passage in *Garland* v. *Jekyll* (1824), 2 Bing. at 296; 9 Moore, C. P. 502; 2 L. J. (O. S.) C. P. 227; 27 R. R. 630: "I know it has been said, that Lord Coke in this case [*The Compleat Copyholder*, s. 5 b] must be mistaken, for in the margin is a reference to Lord Coke's Reports [Co. 4, *fol.* 27*b*], and upon referring to the page you find nothing to warrant his opinion. . . . It appears to me that the reference was not made by Lord Coke, but that it has been introduced by some ignorant editor who fancied something confirmatory of the opinion in 4 Coke. The fact is, Lord Coke had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice, and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense." Those are the words of Best C. J.

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If a layman's opinion of Lord Coke were wanted we might turn to Milton, who says of him:—

> " Cyriack, whose grandsire, on the royal bench
> Of British Themis, with no mean applause
> Pronounced, and in his volumes taught, our laws,
> Which others at their bar so often wrench. . . ."

But there were other authorities who understood this matter in precisely the same way. They were perhaps lesser authorities, yet it is useful to shew what was the volume of opinion held while lawyers were considering these matters. In Pulton, De Pace Regis et Regni (Lond. 1609), at p. 110b, the author says: "if a subject borne of this Realme, being beyond the seas, doth practise with a prince or governor of another countrey to invade this Realme with great power, and doe declare, where, how, and by what meanes the invasion may best bee made, it is High Treason: for an invasion with great power cannot be, but of likelyhood it will tend to the destruction or great perill of the K. and hurt to the Realme: and moreover the said offendor hath manifested himselfe to be adherent to the K. enemy and to aid him with his counsell, though not in the Realme, yet elsewhere. And this offence shalbe tryed in the K. Bence, or elsewhere, before such commissioners, and in such countie, as the King by commission shal appoint, according to the stat. of 35 Hen. 8, 2." A much more modern writer was of the same opinion. In Stephen's Digest of the Criminal Law, Art. 55 (5th ed. (1894), p. 44), we find: "Everyone commits high treason who, either in the realm or without it, actively assists a public enemy at war with the Queen." In 1775 a valuable opinion to the same effect was given by the law officers of that time, Thurlow and Wedderburn (see Archbold, Criminal Pleading, 24th ed. p. 1033n). The law officers were asked how it was proper to proceed against persons for high treason committed in New Hampshire, which was in the King's dominions in America, as an Act which had been passed against treason in that province in 13 Anne had subsequently been disallowed by Order in Council in 1718. Their reply was that it required "no Act of a provincial legislature to constitute the offence of high treason in any of his Majesty's plantations. The crime may be prosecuted in the superior Court of New Hampshire (which by 11 Wm. 3 hath the full criminal jurisdiction

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within that government which his Majesty's Court of King's Bench exercises here) or in this country under the statutes [*sic*] of 35 Hen. 8, as the occasion may require." That statement covers this case exactly. The treason was not committed within the King's realm, but elsewhere. There is no pretence that the traitor, whether by adherence to the King's enemies or in some other form, was within the realm. The opinion of Thurlow and Wedderburn is in entire agreement with that expressed by this Court to-day.

I do not know whether it is worth while to allude to the paragraph to which Serjeant Sullivan called our attention in *Platt*. It is to be noticed that no stress whatever is laid by the Court there upon the words which, Serjeant Sullivan insists, govern the whole of this particular description of treason, that is the words "in the realm": it is said (at p. 168): "It was an ancient opinion, that the species of treason which consists, by 25 Edw. 3, c. 2, *in adhering to the King's enemies*, might be tried, before the statute 35 Hen. 8, c. 2, within the kingdom, by the rules of the common law, though the *aid and comfort* was afforded *without the realm;* but that every other species of treason committed out of the realm, must be tried in the place where it was committed, or under the provisions of that Act of Parliament."

We do not think it necessary to give further reasons for the conclusion to which we have come. We purposely do not rely upon a recent case [*Lynch*] which has been questioned by Serjeant Sullivan, because we think there is, in the reported decisions and in the opinions of the great lawyers to whom I have already referred, ample authority for the decision to which the Court indubitably came in that case.

It only remains, therefore, to say that this appeal is dismissed. The notice of appeal included further grounds which questioned the Lord Chief Justice's direction to the jury. Those grounds of appeal are entirely withdrawn by counsel for appellant, and it is unnecessary to say anything about them.

Appeal dismissed.

Solicitor for the Appellant—*George Gavan Duffy*.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, MR. JUSTICE LAWRENCE, MR. JUSTICE SCRUTTON, AND MR. JUSTICE ATKIN.

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The Court will in a proper case deal with a point raised in the notice of appeal, even if it is abandoned by counsel.

DARLING J.: This Court has assembled to-day because we were informed by the King's Coroner some days ago that appellant's solicitor had stated to him that it was proposed to make some application to the Court to consider some points which were mentioned in the notice of appeal, but were not argued by the learned Serjeant. [See p. 116, above.] The Court has been left in considerable doubt from day to day whether an application is to be made or not. If it is, there is now an opportunity to make it. A distinct notice has, however, been received this morning that appellant's solicitor does not intend to make any application. I may, therefore, say that the Court was in no way surprised when at the end of his argument the learned Serjeant announced that he would abandon the second "ground" of the notice. It was, however, suggested to the King's Coroner that counsel had no authority to do so. But the Court retired at that point to consider whether it would call on the Crown to reply, and to deal with any other point which arose. The judges of this Court always read all the available papers in a case before the appeal is heard. In this instance the Court came, on the second "ground," to the same conclusion as the learned Serjeant. Had one of us thought that there was any substance in any point therein raised, we should have dealt with it, whether it was abandoned by counsel or not.

The suggestion that the learned Serjeant had no authority to take the course which he took can hardly be made with any plausibility, for he made his statement thereon in the presence

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of his client, his two learned juniors and his solicitor, any of whom had ample time during the twenty minutes' retirement of the Court to approach him on the subject.

Powell, K.C., asked leave to make a personal explanation. He was not briefed on this occasion, but had been retained to argue points of law if the appeal went to the House of Lords. He was only present because he understood that the Court thought that he ought to be present. He had never had reason to contemplate such an application as Darling J. had referred to.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE LOW.

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HARRY MACDONALD.

Severity of sentence.

The Court will not grant relief merely because appellant could not procure the services of counsel at the trial, if it is satisfied that he was not prejudiced by that fact.

Habitual criminal.

The fact that warrants have been issued against defendant since his last discharge from prison may be proved on the trial of the allegation that he is a habitual criminal if the jury are properly directed thereon.

Proviso to sect. 4 (1) *of the Criminal Appeal Act applied.*

This was an appeal against conviction as a habitual criminal, by leave of Scrutton J., and against sentence. There was also an application for leave to call further evidence. Appellant was convicted, on the 28th April, 1916, at the Hereford Sessions, of larceny and of being a habitual criminal, and was sentenced to five years' penal servitude and five years' preventive detention.

Bosanquet (under s. 10 of the Criminal Appeal Act) for the appellant, who was present. Appellant in this case asked for a dock defence, and produced the money; but there was only one counsel present and he was appearing for the prosecution. The Recorder offered to adjourn the case, but said that he would watch appellant's interests if he preferred the trial to go on. In such a case the rule is that a solicitor has the right of audience, and although the Recorder no doubt did all he could for the appellant, I submit that the latter's interests were prejudiced.

Appellant was released from prison on the 11th April, 1914, and evidence was given that several warrants had been issued against him since that date. This was not admissible evidence to prove that he had been "leading persistently a dishonest or

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criminal life." It did not follow that he was guilty of the offences: see *Sullivan*, 9 Cr. App. R. 201 (1913). In passing sentence, the Recorder took these cases into consideration, and apparently was under the impression that appellant had consented to this course, but there is nothing in the shorthand note to shew that he had consented. If those cases had not been taken into consideration it does not follow that the Recorder would have imposed a sentence of penal servitude, and in the absence of penal servitude the sentence of preventive detention could not have been passed.

The appellant stated that he had worked for four or five weeks for the Coventry Perseverance Co-operative Society, and had written to them asking them to verify this; no answer had been received at the time of the trial.

[The LORD CHIEF JUSTICE: He has now handed in a letter, dated the 27th April, from the Society, which states that he worked for them for twenty-two and a half hours only in the week ending the 27th March, 1914.]

A list of convictions, other than the three statutory convictions, was read out but not properly proved, as was held necessary in *Culliford*, 75 J. P. 232; 6 Cr. App. R. 142 (1911).

[AVORY J.: There was evidence that appellant had admitted these when he was convicted at Preston.]

Appellant wishes to call his wife as a witness; she was indicted with him for larceny, but the grand jury threw out the bill; she was, however, not released from custody until the end of his trial, so he may not have known that she could give evidence there. I do not know what she is expected to prove.

H. G. Farrant, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of stealing two bicycles and of being a habitual criminal. He was sentenced to five years' penal servitude for the larceny and to five years' preventive detention as a habitual criminal. Mr. Bosanquet has argued that the sentence of five years' penal servitude cannot stand, and that the appellant should properly have

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been only sentenced to imprisonment, and that as it is a condition precedent to sentence as a habitual criminal that the prisoner should be sentenced to penal servitude, the conviction and sentence as a habitual criminal should be quashed. That depends on the view we take of the sentence of five years' penal servitude. Looking at appellant's record, it is impossible to say that the Recorder was not justified in passing that sentence, even if the other offences were not taken into account. There were a number of convictions against appellant, including two sentences of penal servitude. On these facts alone the sentence was justified, but the Recorder took into consideration a number of warrants which had been issued against this man. He was charged with committing a number of offences in the interval between his release from prison in April, 1914, and his arrest for this crime. Stealing bicycles seemed to be almost a monthly occupation with him, and he was also charged again and again with stealing other articles. So that all we know about him in the interval is that there were warrants against him for theft in different places, and that he says he was employed for some weeks at the Coventry Perseverance Co-operative Society. As to that he has handed in a letter which disproves his statement, and shews that he was only employed by them for twenty-three and a half hours. Even if it were true that he worked as he says, no satisfactory explanation is given of the rest of the time. We cannot agree that the Recorder was wrong in taking the warrants into consideration. It is true that no specific admission appears upon the note, but the Recorder acted in mercy to the appellant in letting him have a clean sheet on his release, as he would probably have passed the same sentence otherwise. It is clear that, though it is not in the record, some admission must have been made.

Then it is said that there were several irregularities at the trial, and, first, that no counsel was present to defend appellant. But the Recorder offered to adjourn the case and let him have counsel, but said he would watch the case if the appellant liked to be tried then. It is clear that appellant chose that alternative, and that the Recorder did watch his interests and cross-examine the witnesses, so no complaint can be made on that score.

Then it is said that he did not call his wife to give evidence.

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HARRY MACDONALD.

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That is true, but what use would his wife have been when he refused to go into the box himself and did not address the jury?

Though certain irregularities may be found, it is clear that they were cured during the course of the case, and that there was no substantial miscarriage of justice as regards these matters.

The last point is that evidence was received of the warrants as to offences committed by appellant in the interval since his release from prison. It is not contended that this was more than evidence of repute; charges made against him and the fact that the police had not been able to arrest him. A sworn information is necessary before a warrant can be issued, and we must presume that a warrant would not be issued unless there was a *primâ facie* case. The Recorder pointed out to the jury that it might be that some of the charges were not true, but appellant might have given evidence denying them, and did not do so. In the opinion of the Court no fault can be found with the conviction or sentence, and the appeal must be dismissed.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SCRUTTON, AND MR. JUSTICE LOW.

WILLIAM KINGSLEY GILLING.

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31 *July.*

Fresh evidence will be heard when the evidence of identification is unsatisfactory.

This was an appeal against conviction by leave of the full Court, and an application to call further evidence. Appellant was convicted, on the 28th June, 1916, at the Surrey Assizes, before Darling J., of forgery, and was sentenced to five years' penal servitude, to run concurrently with a previous sentence of twelve months' imprisonment with hard labour.

Thesiger for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted for forging and uttering a cheque for £970 in the name of a bookmaker named Marks. At 10.30 a.m. on 26th October, 1915, a man, who was not identified, came to the Esher branch of Barclay's Bank with an order for a cheque book in the name of Marks; this order was a forgery. He was handed the cheque book, and at 1.15 p.m. a man, who was alleged to be the appellant, presented the cheque in question, which was one in that book; he endorsed it "J. C. Young" in the presence of the cashier. He was given £70 in notes and a draft on the head office for £900. At 2.40 p.m. this draft was presented at the head office by a man, who was not identified, and cashed; it was endorsed in the same name. The only issue at the trial was whether the man who presented the cheque at Esher was the appellant or not. The cashier and the manager identified him, but the latter did so when he was in

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the dock on another charge, and although the cashier picked him out of a number of men, the manager admitted that they had in the meantime discussed appellant's personal appearance. Both were quite certain that the man was clean shaven.

The appellant gave evidence that on that date he was wearing a moustache, although clean shaven when he was arrested on the 24th February. He said he had shaved it off about a week before Christmas to please his *fiancée*. He said he had been in hospital until the 8th September, when he had a beard and moustache, but shaved the beard off very shortly afterwards. Three witnesses testified to the appellant having had a moustache at the end of October. One Adams, who was very deaf, and possibly nervous in consequence, testified that appellant was clean shaven on the 10th November, and that he had seen him with a beard and moustache, at what time he did not specify, but never with a moustache only. The learned judge laid great stress on the discrepancy between his evidence and that of the other witnesses called for the defence.

I submit that the learned judge misdirected the jury on a point of law by telling them that if appellant forged the endorsement he was guilty of forging the cheque. It is true that the Forgery Act, 1913, s. 1 (1), defines forgery as making a false document in order that it may be used as genuine, and s. 1 (2) says, "A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making," but by s. 2 (2) (a) forgery of the following documents (among others) if committed with intent to defraud is made a felony punishable with penal servitude for life: "Any valuable security or assignment thereof or endorsement thereon." It is clear that the forgery of a cheque could not be proved by evidence that defendant forged the assignment of it, and therefore forgery of the cheque, assignment and endorsement must be treated as three separate crimes, and defendant must be indicted accordingly. Since forgery of an endorsement was made a statutory crime it has always been the custom to indict for forging the endorsement, if that was the offence intended to be proved, and not for forgery of the cheque itself. The conviction for uttering cannot stand, for the judge not only did not direct the jury on

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the essential matters to be proved on such a charge, but expressly told them not to trouble about the uttering.

On the question of identity, appellant has given the names of thirteen further witnesses, but I only ask leave to call two; the others either cannot be traced in the time or are not sufficiently definite about dates to assist the Court.

Simon Coates called and examined by *Thesiger*. I am the manager of the Crown Commercial Supply Co., of 83, Upper Thames Street. I have known appellant all my life. He called at my house about four times on Sundays between 10th October and 25th November, 1915. He then had a moustache. I can fix the dates by a book (produced) in which appellant wrote his name, and by my daughter's illness; I saw appellant at the door and told him she was too ill for him to come in.

Cross-examined by *A. E. Woodgate* for the Crown. I have never seen him with a beard, but sometimes he has been unshaven. In January he called on me and I noticed that his moustache had disappeared.

A. E. Jessop called and examined by *Thesiger*. I am a claims clerk in the employ of the Great Eastern Railway. I saw appellant twice with reference to a claim between 4th November and 1st December, 1915. He then had a moustache and beard. The moustache did not appear to be of recent growth.

Cross-examined by *Woodgate*. I had seen him before that. I have never seen him without a beard so far as I know.

The discrepancies in the evidence given by the witnesses are remarkable, but the explanation may be that the appellant sometimes went some days without shaving, and then appeared to have a closely trimmed beard.

The judge misdirected the jury on this question. He first correctly told them that if they were in doubt whether the appellant had a moustache or not on the 26th October he was entitled to be acquitted, but later he asked if the discrepancies in the evidence called for the defence did not raise a doubt in their minds, in which case they should convict him. In the uncertainty of the question of identification, I ask the Court to compare the writing of the endorsement, which was written in the presence of the

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cashier by the man who presented the cheque, with three documents proved at the trial to be in the handwriting of the appellant, and the writing in Mr. Coates's book.

Woodgate for the Crown. The appellant was rightly convicted of forging the cheque within s. 1 of the Forgery Act, 1913; any addition or material alteration to the cheque would constitute forgery. The cheque was payable to order, and could not be cashed until endorsed; the endorsement was therefore a material part of the cheque. Section 2 only deals with the question of punishment for such an offence. *Birkett*, R. & R. 251 (1813), cited in the text-books as an authority for the proposition that forgery of a cheque cannot be proved by proving the forgery of the endorsement, is not an authority for that proposition, as the whole question at issue in that case was whether the document therein called a bank post bill could in an indictment be described as a bill of exchange or alternatively as a bank bill of exchange. The indictment in that case was framed as one for forging an endorsement of the bill, so that the point for which it is cited in the text-books did not arise for consideration.

On the question of identity, it was proper for the judge to point out that the witnesses for the defence differed among themselves. The explanation given by appellant of his movements on the 26th October was one which the jury were likely to disbelieve, and they were entitled to accept the positive identification by the bank manager and the cashier.

The LORD CHIEF JUSTICE: Appellant was convicted on two counts of an indictment which charged him with forging a cheque, and uttering it knowing that it had been forged. The case comes before us on the verdict of a jury who heard the witnesses called before them, and on a direction of the judge on the facts of the case, and with that direction, although it has been subjected to some criticism, no substantial fault can be found, except that it was said by the judge, as a result of the course taken by the case, that if appellant wrote the endorsement he was guilty of forging the cheque In the ordinary course the indictment is that which would be applied to forgery of the cheque, and not of the endorsement on the cheque. Special reference is made to an endorsement on or assignment of a cheque in the forgery statutes, and the

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text-books dealing with indictments before the new Indictments Act (which is not applicable here as appellant was committed for trial before it came into force) indicate that the usual and proper course is to charge that particular offence in the indictment, and that it is unusual to charge it in the form that was followed here. Having regard to the course taken by the trial, where both the prosecution and the defence treated the sole issue as one whether appellant was the person who forged or uttered the cheque, we should hesitate very much before upsetting the conviction on the technical ground that the indictment did not charge the prisoner with forging the endorsement, but the whole cheque. In view of the conclusion we have come to it is not necessary to decide the case on that ground.

The substantial contest was on the question of identity. There was evidence on which the judge was bound to leave the case to the jury, and which justified the jury, if they believed the evidence for the prosecution, in convicting. But there are exceptional circumstances in the case which throw a doubt on the identity of appellant as the person who did the act which was the only one discussed at the trial, namely, present the cheque for which he received the amount of the cheque. On the same day that he presented it, at 10.30 a.m. a man, who was not identified, handed the manager a visiting card of Marks, on whose account the cheque was drawn, and a request for a cheque book containing 120 cheques. It is clear that Marks never gave the order, which was forged, and that Marks never got the cheque book. At 1.15 p.m. on that day a cheque was presented purporting to be signed by Marks, being one taken from the book obtained in the morning. The cheque was endorsed in the presence of the clerk; all this was on the 26th October, 1915. Payment was made in Treasury notes and a banker's draft on the head office of the bank. At twenty minutes to three the draft was presented at the head office, endorsed in the same name and apparently in the same handwriting. There was no identification of appellant as the person who presented the draft, which may well be explained as the draft was in the regular form and in order. It turned out that the cheque was a forgery, and the endorsement, which was in the name of J. C. Young, was a forgery, and the question is whether it is established that appellant was the person who presented the cheque, and endorsed it, at 1.15. Evidence to that

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effect was given by the bank manager and the cashier, the evidence of the cashier being the stronger of the two. Appellant was tried on the 28th June; the warrant was read to him on the 24th February, and the offence was committed on the 26th October, 1915. That was in substance the evidence for the prosecution. Appellant gave evidence that he had never been in Esher in his life, that he had not taken any part in the matter, or signed the endorsement. He had been identified by the witnesses for the prosecution as a clean-shaven man wearing a black coat and tall hat. According to his statement he had not worn a tall hat for some years, and the only suit he possessed was the one which he was wearing: and further, on the 26th October he was wearing a moustache, and only cut it off about a week before Christmas. Witnesses were called for the defence on the question of identity. First of all, there is the evidence of Miss Teenby, a barmaid at the Euston Tavern. If her evidence is accepted, she saw appellant constantly in October and November, when he always had a moustache. Mrs. Orbell saw him at various dates between the 9th October and the 5th November, when he had a moustache. Mrs. Morrison saw him in October and November, at first with a moustache, but some time in November he ceased to have one. Evidence was also given by Mr. Adams, a tailor, who produced a book shewing that a suit was ordered by appellant on the 20th November, and that on that date he was clean shaven; that when not clean shaven he had seen him with a beard and moustache. There is no doubt that the evidence was conflicting and unsatisfactory on this point. The judge had the witnesses back and questioned them; their answers shewed that they did not agree about the beard; as far as their observation went he first took off his beard and then his moustache.

We were asked to hear further evidence, and with great hesitation, having regard to the exceptional circumstances of the case, allowed it to be called. The effect of this evidence is certainly to impress more on us the unreliability of the evidence of identification of this man. The witnesses do not quite agree, but they agree that about this time they were seeing him, and that he had a moustache. If he had a moustache on the 26th October it is clear that he is not the man who presented the cheque, and on the whole we think it unsafe on the evidence we have before us to allow the conviction to stand. This decision must not be misunderstood. The

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Court bears in mind that the jury saw the witnesses, but we have had witnesses before us, and the case is left in considerable doubt. We think that the additional evidence called to-day would have impressed the jury, and we have, therefore, come to the conclusion that the only safe course is to quash the conviction.

Conviction quashed.

Solicitors for Appellant—*J. Westcott & Sons.*

A. L. B. T.

CHARLES JOHNSTON.

It is undesirable to prefix a sentence of imprisonment with hard labour to one of penal servitude.

This was an appeal against conviction by leave of the full Court. Appellant was convicted, on the 28th June, 1916, at the Surrey Assizes, before Darling J., of sodomy, and gross indecency with male persons; he was sentenced to penal servitude for life and to two years' imprisonment with hard labour.

Appellant in person.

St. John Hutchinson for the Crown (who was called on only in regard to the concurrent sentences). If a prisoner is found guilty of the felony and the misdemeanour, and is only sentenced to one day's imprisonment for the misdemeanour, and if he then appeals successfully against the conviction for felony only, there would then be only the sentence of one day left. The difficulty might be met by postponing the sentence for the misdemeanour to the next assizes.

[The LORD CHIEF JUSTICE referred to *Bruce*, 5 Cr. App. R. 213 and 233; 1910.]

The LORD CHIEF JUSTICE: Appellant pleaded guilty to four indictments for sodomy, and one for gross indecency with male persons. On the evidence there is no doubt that the offences were not only of a very grave character, but the circumstances in which

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they were committed were in the highest degree mischievous and injurious to the boys' morals and whole future life. It is impossible to deal with the case except on the footing that appellant must be prevented from gratifying his horrible taste. The sentences imposed were two years' imprisonment with hard labour and penal servitude for life. The effect of that is that the hard labour will be served first, and then the penal servitude. In our view the imprisonment with hard labour should be reduced to one day, but the penal servitude for life must stand.

Sentence reduced.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE BRAY.

FLORENCE MARGUERITE ADAMS.

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22 *August.*

Sentence mitigated in view of facts not disclosed at the trial.

Appeal against sentence.

On July 18th, 1916, before the Recorder, at the Central Criminal Court, the appellant pleaded guilty to a charge of bigamy, and was sentenced to twelve months' imprisonment with hard labour.

Curtis Bennett for the appellant, who was present. When the case was before the Recorder the appellant was not represented by counsel. She was given no opportunity of cross-examining the witnesses for the prosecution, and their evidence consequently went unchallenged. Facts—having reference to her husband—favourable to the appellant were not brought to the notice of the Recorder as they would have been had she been represented.

The Crown was not represented.

THE LORD CHIEF JUSTICE: It is unnecessary to go in detail into the facts of this case. The offence was quite clearly made out, and it is obvious that it would have been impossible for the appellant to do otherwise than to plead guilty. The only question for our consideration is whether or not the sentence is too severe. Bigamy is a very serious offence, and as a general rule a sentence of twelve months' imprisonment with hard labour could not be said to be excessive. But all these cases must be dealt with on their particular facts. Here the Court is satisfied

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FLORENCE MARGUERITE ADAMS.

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that if the facts which have been stated to-day had been brought to the notice of the Recorder before he passed sentence the sentence would not have been what it was. In our opinion a sentence of six months' imprisonment with hard labour is sufficient to meet the justice of this case.

Sentence reduced.

G. B.

Solicitor for the Appellant—*H. Cowper Seard*, Greenwich.

WILLIAM RIDLEY CARR.

On an indictment for obtaining by false pretences, it is not always essential that the jury should be directed in so many words that there must be an intent to defraud.

Appeal against conviction.

The appellant, William Ridley Carr, was convicted, on June 29th, 1916, before the Chairman, at Maidstone Sessions, of obtaining money by false pretences, and was sentenced to three years' penal servitude.

C. F. L. Bridgman (under s. 10 of the Criminal Appeal Act) for the appellant, who was present. At the trial the prosecution alleged that the appellant called on two persons, said that he was blind, whereas in fact he was not, and asked them to give him orders for books to enable him to get into a blind institution, which they did. He took the money, but the books were not delivered. The appellant in evidence denied that he had said that he was blind, but maintained that he had said that he was "all but blind," which was true, and that the books would have been delivered had he not had difficulty in getting them from the booksellers. In summing up the case to the jury, the Chairman said: "You must understand to prove a charge of false pretences there must be a statement of some existing fact made to induce the prosecutor to part with his property, and you must be satisfied that he parted with his property believing that statement to be

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WILLIAM RIDLEY CARR.

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true." The Chairman then shortly reviewed the evidence, and concluded: "If you are not satisfied that this man made a false pretence in order to obtain the money, then you must acquit him, but if you are satisfied you must find him guilty of this charge of false pretences." He nowhere told the jury that they must find that the appellant had an intent to defraud. Such intent is an essential element in the offence of obtaining by false pretences, and the jury had no direction on the issue raised thereon and apparently never took it into consideration. In *Ferguson* (1913), 9 Cr. App. R. 113, in almost identical circumstances, the conviction was quashed. It is impossible to say that this is one of those cases where intent to defraud can be inferred from the facts. If a man tells an untruth to get an order for goods and delivers those goods he is not guilty of obtaining the price of the goods by false pretences. It cannot be assumed that the appellant would not have delivered the books, as proceedings were instituted so soon after his visits to the prosecutors. For these reasons the conviction of the appellant should be quashed.

C. M. Pitman for the Crown was not called upon.

DARLING J.: In the opinion of the Court this appeal must be dismissed. It is impossible to conceive that the appellant made the false pretence, which it cannot be contended that he did not make, with any other object than that of defrauding the prosecutors. In some cases no doubt it is essential that the attention of the jury must be drawn with great care to the necessity of their finding an intent to defraud on the part of the accused person, but this is not one of them. The intention of the appellant could not have been in doubt. In any case, under s. 4 (1) of the Criminal Appeal Act, 1907, we have power to dismiss this appeal, as in our view no substantial miscarriage of justice has occurred.

Appeal dismissed.

G. B.

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22 *August.*

JOSEPH SIMMONITE.

On an indictment under the Punishment of Incest Act, 1908, *there may be a conviction for indecent assault. The true construction of the words in s.* 4 (3) *thereof, "guilty of an offence under s.* 4 *of the Criminal Law Amendment Act,* 1885," *is not "guilty of an offence* created *by s.* 4, *&c." By virtue of s.* 3 *of the Indictments Act,* 1915, *on an indictment for incest with a girl under thirteen years of age there may be a conviction for any offence under ss.* 4 *and* 5 *of the Criminal Law Amendment Act,* 1885.

Appeal against conviction.

The appellant, Joseph Simmonite, was convicted, on July 17th, 1916, before Shearman J., at the Leeds Assizes, of indecent assault, and was sentenced to twelve months' imprisonment.

Paley Scott (under s. 10 of the Criminal Appeal Act) for the appellant, who was present. The appellant was tried on an indictment under the Punishment of Incest Act, 1908, for an offence with his daughter of nine years of age, and was convicted of indecent assault. The conviction must be quashed since a verdict for indecent assault is not possible upon an indictment for incest. It is true that s. 4 (3) of the Punishment of Incest Act, 1908, provides that if, on the trial of an indictment for incest, the jury are satisfied that the defendant is guilty of an offence under s. 4 of the Criminal Law Amendment Act, 1885, and not of incest, the jury may acquit the defendant of incest and find him guilty of an offence under that section (or s. 5)—defilement of a girl under thirteen (s. 4). It is also true that s. 9 of the latter Act provides that a person accused of any offence made felony by s. 4 may be found guilty of indecent assault. But these provisions cannot avail the prosecution here as s. 1 of the Punishment of Incest Act, 1908, must refer to offences *created by* s. 4 of the Criminal Law Amendment Act, 1885, and indecent assault is not such an offence. The indictment for incest cannot be treated as one for an offence under s. 4 of the 1885 Act, as it does not conform to s. 3 (1) of the Indictments Act, 1915, 5 & 6 Geo. 5, c. 90, which requires "a statement of the specific offence" charged, and by Rule 4 (3) "a reference to the section of the statute creating the offence." Moreover, s. 9 of the Act of 1885 refers only to the trial of persons accused of felony under s. 4, and cannot, therefore, be extended to proceedings under an entirely

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different Act. Nor does it make indecent assault an offence under s. 4, but merely gives the jury the right to convict thereof on an indictment for felony under s. 4. Statutes have never given a right to convict of one misdemeanour on an indictment for another, because any number of misdemeanours may be found in one indictment.

Ellison for the Crown. The jury in this case could have found the appellant guilty of an offence under s. 4 of the Criminal Law Amendment Act, 1885, as there were present all the necessary elements of the offence of carnally knowing a girl under the age of thirteen. He must, therefore, be dealt with as if he had been indicted under the Act of 1885 as well as under the Act of 1908. The fact that he was the father of the girl made the offence no less one under s. 4 of the Act of 1885.

Paley Scott in reply.

The LORD CHIEF JUSTICE: The point argued by Mr. Paley Scott on behalf of this appellant is of some importance. Section 4 (3) of the Punishment of Incest Act, 1908, means that a person indicted for an offence under that Act may, if the jury think fit, be convicted of an offence under s. 4 of the Criminal Law Amendment Act, 1885, and be acquitted of the offence of incest. Section 4 of the Criminal Law Amendment Act, 1885, creates the offence of unlawfully and carnally knowing a girl under the age of thirteen years, which is made a felony. By s. 9 of this Act a person who is indicted for a felony under s. 4 may be found guilty of an indecent assault. The question for our consideration here is whether or not upon an indictment under the Punishment of Incest Act, 1908, a person can be found guilty of indecent assault under s. 9 of the Criminal Law Amendment Act, 1885.

It has been argued that there can be no such conviction because s. 4 (3) of the Incest Act must be read as if the words "guilty of an offence under s. 4 of the Criminal Law Amendment Act, 1885," were "guilty of an offence created by s. 4" of the Act. We do not think that that is the true meaning of the section. It was intended that that which could be punished as an offence under s. 4 could still be punished even though the offender had

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been tried upon an indictment which was in terms for an offence under the Punishment of Incest Act, 1908. To construe the section as Mr. Paley Scott invites us to do would be to introduce words into the section, and would give a highly technical meaning to an enactment which was framed to get rid of technical difficulties. In our view this point fails.

Mr. Paley Scott also argued that s. 9 of the Criminal Law Amendment Act, 1885, only applies to the trial for an offence made a felony by s. 4. There is more substance in this point, but upon examination it seems to us that here again we must ascertain the intention of the legislature, and, from the language used, come to the conclusion that the appellant could be convicted of an offence under s. 4. The indictment in form and in terms was under the Punishment of Incest Act, 1908, but the appellant for this purpose must be regarded as indicted both for the offence of incest and—if the jury thought fit not to find him guilty of that offence—for an offence under s. 4 of the Criminal Law Amendment Act, 1885. That is the true meaning of the language of the statute. Once we come to that conclusion all difficulties are resolved, because this case must then be regarded as the trial of the appellant for an offence under s. 4, and s. 9, therefore, will undoubtedly apply. The indictment is stated to be an indictment under the Punishment of Incest Act, and incest is, under s. 3 of the Indictments Act, the specific offence charged against the appellant therein, but an indictment for incest in certain circumstances carries with it and includes an indictment for an offence under s. 4 (or s. 5) of the Criminal Law Amendment Act, 1885.

For these reasons the Court is of opinion that the conviction of the appellant is proper in law and must stand.

Appeal dismissed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE BRAY.

DUDLEY FREDERICK WEST.

1916
21 *September.*

When guilty intent is of the gist of an offence, evidence of similar acts to those charged at or about the same time as the latter is admissible to prove the intent.

Application for leave to appeal against sentence.

The applicant, Dudley Frederick West, was convicted on August 4th, 1916, before the Recorder at the Sandwich Quarter Sessions, of obtaining money by false pretences, and was sentenced to nine months' imprisonment with hard labour.

The facts alleged by the prosecution were that the applicant, in answer to an advertisement in a newspaper, stated that he was in a position to supply pedigree dogs to the person who had inserted the advertisement, and would send the animal on trial on receipt of a cheque for three guineas. The money was sent, but the appellant failed to deliver the dog and kept the money.

Appellant in person: At the trial witnesses were called by the prosecution who gave evidence that, on instances other than those in respect of which I was charged, I had attempted to obtain money by falsely pretending that I would supply persons with dogs. Such evidence was inadmissible, and my conviction should therefore be quashed.

The Crown was not represented.

THE LORD CHIEF JUSTICE: This appellant complains that at his trial evidence was given that he had attempted to obtain money by false pretences from persons other than the gentleman on whose behalf the prosecution had been undertaken. That evidence was

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adduced to prove intent to defraud on his part. This Court has held again and again that where guilty intent is of the gist of an offence, evidence to prove such intent is admissible although it relates to the commission by the accused person of other similar acts at or about the same time as those charged against him in the indictment. This application must therefore be dismissed.

Application dismissed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE AVORY.

1916
16 *October.*

GERALD KENNAWAY ALIAS GEORGE KENNEDY.

There may be forgery of a "will .... of a dead .... person" within s. 2 (1) (a) of 3 & 4 Geo. 5, c. 27, the Forgery Act, 1913, although the late address of the deceased is wrongly described.

To corroborate the evidence of an accomplice who has deposed to a similar act by defendant to that charged, the latter may be cross-examined about the commission of that act.

Severity of sentence.

This was an appeal against conviction on points of law, and an application for leave to appeal against sentence. Appellant was convicted on the 26th July, 1916, at the Central Criminal Court, before A. T. Lawrence J., of forgery, and was sentenced to ten years' penal servitude.

E. A. Swan for the appellant, who was present. The appellant was tried for forging the will of Jane Augusta Leete. This lady was described as being of Elmfield, Bath. There was no such person. There was a Miss Jane Augusta Leete of 29, Wilberforce Road, Stoke Newington, and it is true that the pretended executors swore an affidavit that the testatrix was of Stoke Newington, formerly of Bath; this, however, did not make the will that of Miss Leete of Stoke Newington. It was therefore the will of a fictitious person, and the appellant could not be convicted under ss. 1 (2) (b) and 2 (1) (a) of the Forgery Act, 1913, which relate to documents purporting to be executed by a dead or living person. A fictitious person can be neither. No doubt the appellant could have been convicted of a misdemeanour under s. 4 (1), but the maximum penalty for such an offence is two years' imprisonment with hard labour. The fact that by the forged will legacies were left to relations of the supposed deceased who were not relations of Miss Leete of Stoke Newing-

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16 *October*.

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ton bears out my contention that the will did not purport to be hers. Everything in the document was fictitious.

[AVORY J.: Ss. 1 and 2 of the Forgery Act, 1913, have to be read together. By s. 1 it is equally forgery if the name forged is that of a fictitious person. S. 2 is governed by the word "forgery," and to see what "forgery" means you must look at s. 1.]

Swan: S. 1 clearly differentiates between wills of real and fictitious persons, and s. 4 (1) imposes the penalty for the latter.

Muir: Assuming that it was the will of a fictitious person, it has long been decided under a statute containing similar words that the making of such a will is forgery. *Avery*, 8 C. & P. 596 (1838).

[The LORD CHIEF JUSTICE: The meaning of "fictitious person" was discussed in *Vagliano* v. *The Bank of England*, 23 Q. B. D. 243; 58 L. J. Q. B. 357; 61 L. T. 419; 37 W. R. 640; 53 J. P. 564: 1899.]

Swan: Here, however, s. 1 (2) (b) and s. 2 (1) (a), I submit, exclude from felonies appellant's offence.

The appellant's conviction rested mainly on the evidence of accomplices, Bruce and Vaughan. They stated that he had told them that he had been guilty of a similar transaction eighteen years before. The appellant was cross-examined, not merely whether he had made such a statement, but on its truth, and the name of the person whose will had been forged, the amount of money fraudulently obtained, and the will itself, were put to him. Such cross-examination tended to shew that he had committed another offence to that for which he was being tried, and was therefore in breach of s. 1 (f) of the Criminal Evidence Act, 1898. The judge admitted it as corroborating the evidence of the accomplices.

By leave of the Court the appellant also argued the two points raised by counsel, and on the second point referred to *Butler*, 2 C. & K. 221 (1846).

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R. D. Muir (with him *Roome*) for the Crown (who was called upon about the cross-examination of the appellant only). According to the evidence of Bruce and Vaughan, the reference by the appellant to the previous offence was made as a reason why he should not act as one of the executors in the present case; he was afraid that the risk of detection might be increased. The two witnesses also stated that the appellant himself wrote the names of the testatrix and of both witnesses in the will. The will of eighteen years ago, purporting to be that of Fanny Fisher, was produced, and the signature "Fanny Fisher" bore a striking resemblance to that of one of the witnesses to Miss Leete's signature and also to the appellant's natural handwriting. Cross-examination of the appellant on these points was relevant as tending to corroborate the evidence of the accomplices, and was therefore admissible under s. 1 (*f*) (i) of the Act of 1898, in spite of the fact that it tended to shew that the appellant had committed another offence.

Swan in reply: There was no evidence that the instrument purporting to be the will of Fanny Fisher was forged, and this was not pointed out to the jury. Any supposed similarity in handwriting would not, therefore, help the prosecution by way of corroboration.

A. L. B. T.

The LORD CHIEF JUSTICE: The appellant, Gerald Kennaway, was convicted of forging a will purporting to be the will of the late Jane Augusta Leete, and also of uttering a forged document purporting to be the will of the said Jane Augusta Leete. According to the case presented by the prosecution (which was accepted), there was an elaborate conspiracy between four persons, of whom two were named Bruce and Vaughan, and a third was the appellant. Bruce and Vaughan were tried at the Central Criminal Court by Darling J., and upon conviction were sentenced to terms of penal servitude. After the prisoners were sentenced, Darling J., who evidently had had reason to think that there was some other very expert and skilful hand at work behind these two men, advised them to assist the police in bringing this guilty person to justice, and suggested that it would affect their sentences if they did. As a result, Kennaway

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and another man named Hann were put upon their trial at the Central Criminal Court, before Lawrence J. Bruce and Vaughan were called as witnesses, avowedly accomplices in the crime, and went into the witness box and gave their testimony. The effect of their evidence was that this crime was not intended to defraud the estate of the deceased person, Jane Augusta Leete, but to induce persons to advance money on the security of a fictitious legacy in the forged will. From the passages in the evidence which have been read it appears to be quite plain that the course pursued was, first, to ascertain the name of some person who had died within three months, so as to admit of probate of the will without difficulty, and, secondly, to forge a will purporting to be the will of such deceased person, in which legacies were to be inserted which purported to be in favour of the accused persons. It was then proposed that, armed with that document, they should go to some person or persons and try to get money advanced to the purported legatees or for their benefit.

That was the scheme; and according to the evidence in the case which it is unnecessary to pursue at any length, estate duty was paid upon an estate which had never in fact existed, and an attempt was made to obtain an advance upon the security of the fictitious legacy in the forged will.

The prosecution alleged that the appellant actually put to the will the signatures both of the testatrix and of the two witnesses. The three handwritings differed, and necessarily so, but it was alleged that all the signatures were actually written by the appellant. During the course of the evidence of Bruce and Vaughan it was stated that when the scheme was under discussion the appellant was asked why he could not himself act as one of the executors. He refused to do so, and the position was filled by Vaughan. Bruce gave evidence to the effect that the appellant refused on account of a will he had "put through" eighteen years ago, saying, "They might trace it to me if they find out anything about this one," and that the risk was too great. Vaughan's evidence was to the same effect.

In cross-examination of the appellant, Mr. Muir, for the Crown, asked questions for the purpose of shewing that eighteen years ago there had been in fact a document purporting to be the will of one Fanny Fisher in the handwriting of the appellant, written by him for the purpose of getting an advance in the same

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way as was suggested in the present case. This evidence was admitted as evidence tending to corroborate the testimony of the accomplices. It was proved during the case that the will purported to be the will of Jane Augusta Leete, of Elmfield House, Bath, and that in fact Jane Augusta Leete lived at 29, Wilberforce Road, Stoke Newington.

As a result of the evidence, and upon the direction of the judge, which is not impugned before us, the jury convicted the appellant, and this appeal is based upon two grounds, namely, first, that the appellant could not be convicted of the felony of forgery, but only of the misdemeanour of forgery, and could not therefore be sentenced to more than two years' imprisonment. It is not suggested that no offence was committed, but that what was done constituted the misdemeanour and not the felony. Our attention was called to s. 1 (2) (b), s. 2 (1) (a), and s. 4 (1) of the Forgery Act, 1913. The argument addressed to us was that, as the will in question purported to be that of Jane Augusta Leete, of Elmfield House, Bath, and as Jane Augusta Leete, deceased, actually lived at 29, Wilberforce Road, Stoke Newington, that the Jane Augusta Leete whose will was proved was a fictitious person, and therefore the penalty prescribed by s. 2 (1) of the Forgery Act, 1913, did not apply, because the person whose will was forged was neither a dead nor a living person within s. 2 (1) (a), but was a wholly fictitious person. But there is a conclusive answer to that point.

The first thing that counsel for the appellant must shew is that this will is the will of a fictitious person. The Court is clearly of the opinion that it is not. It was the will put forward as that of Jane Augusta Leete, the person who had lately died, and in respect of whom the certificate of death was obtained and used by the appellant and his accomplices. Moreover, in the affidavit for probate the testatrix was described as "of 29, Wilberforce Road, formerly of Elmfield House, Bath." In our view, therefore, this point fails. But we think it desirable to say that it must not be assumed that we view favourably the argument on this point of law, or that we were impressed with the suggestion that if there had been no Jane Augusta Leete of Elmfield House, Bath, that therefore s. 2 (1) (a) of the Forgery Act, 1913, would not apply to this case.

The second point of the argument was that the cross-examina-

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tion on the will of Fanny Fisher was inadmissible by virtue of the provisions of the Criminal Evidence Act, 1898, relating to questions to accused persons tending to shew that they have committed other offences, or are of bad character. It is unnecessary to repeat what this Court has said on more than one occasion, namely, that evidence otherwise admissible can be given against an accused person notwithstanding that it may shew that he had committed an offence other than that with which he was charged, or was of bad character. In this case, merely to elicit the fact that the appellant had committed a forgery eighteen years ago would have been inadmissible. But when you have the evidence of Bruce and Vaughan of the conversation which took place about the reasons given by the appellant for not acting as executor, and containing the statement by him that he had done the same thing eighteen years ago, and that he was afraid if he took any ostensible part in the new scheme that it would lead to detection, it is impossible to say that evidence that he had in fact done this thing eighteen years ago is not some evidence tending to corroborate the testimony of the accomplices and to shew that the appellant was guilty of the offence with which he was charged. Put quite shortly, it amounted to this, that it was part and parcel of the arrangement being made that the appellant should not act as executor, inasmuch as he had once before done the same thing, and detection might thus be made more easy.

For these reasons it seems to the Court that the learned judge was right when he admitted this evidence, because it tended to corroborate the testimony of the accomplices. The second point, therefore, fails.

In view of the gravity of the case and the previous record of the appellant—his previous convictions and the sentences he has served—which proves that he is a very dangerous and expert forger, it is impossible for the Court to review his sentence, and this appeal must therefore be dismissed.

Appeal dismissed.

G. B.

Solicitors for the Appellant—*Wilson, Lambert and Midgley.*

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HENRY BURDEE.

The slightest acceleration of death due to improper treatment is in law primâ facie *manslaughter.*
There is no discrimination in law between degrees of criminal inattention.
Severity of sentence.

This was an appeal against conviction on a point of law, and an application for leave to appeal against sentence. Appellant was convicted on the 7th of September, 1916, at the Central Criminal Court, before Low J., of manslaughter, and was sentenced to twelve months' imprisonment with hard labour.

Roome for the appellant, who was not present. The appellant is a violinist and teacher of music in schools under the London County Council. Some years ago he became interested in herbalism and fasting as a cure for rheumatism, and read various books on the subject. He treated himself and several other persons with success; until recently he did so as a hobby, but in April or May last his patients became so numerous that he began to charge a small fee. On the 3rd July he was recommended to a Mr. and Mrs. Beckerson. Mrs. Beckerson was a confirmed invalid suffering from rheumatism, sciatica, gall stones and haemorrhoids; she was also subject to fainting fits. On 22nd July the appellant saw her for the first time, and ordered her to abstain from food for three days, taking nothing but table-spoonfuls of cold water; he also prescribed injections of cold water, and told her to put her feet and legs in cold water. On the 27th July she appeared very weak; the appellant came to see her, and half-an-hour after he left Mrs. Beckerson had a fainting fit. Her husband applied the usual remedies, but she died that night.

Dr. Spilsbury made a post-mortem examination and found her to have suffered from heart disease, pleurisy, Bright's disease, and gall stones. He said that her death was caused by heart failure due to disease of the heart, accelerated by lack of food. In cross-examination he said that the lady might have died at any time from a heart attack, but in re-examination he said that in his opinion the abstinence from food had accelerated her death.

On the cases I submit that that does not constitute evidence of such criminal neglect as would justify a verdict of man-

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slaughter; the prosecution must prove either the grossest ignorance or criminal neglect. *Williamson,* 3 C. & P. 635 (1807). Low J. adopted the directions given by Bolland B. in *Spiller,* 5 C. & P. 333 (1832). The evidence of Dr. Spilsbury that he was of opinion that the treatment prescribed by the appellant must have shortened Mrs. Beckerson's life is a mere scintilla of evidence which ought not to have been left to the jury. *Smith,* L. & C 607 (1865).

The sentence was too severe; the appellant's age is fifty-nine, and no complaint has ever been made against him before. Hard labour will injure his hands and unfit him for earning his living as a violinist after his release from prison. The jury recommended him to mercy.

Bodkin for the Crown (who was called upon on the question of sentence only). The judge thought that there were elements of cruelty in the case, and that the evidence shewed the appellant to be the merest charlatan.

On the question on which the appeal against conviction has been argued, see *Webb,* Moo. & R. 405; 2 Lewin C. C. 196 (1834).

DARLING J.: The appellant was indicted for the manslaughter of Mrs. Beckerson. She was suffering from a variety of very serious ailments, and it is highly probable that she would not have lived very long, but all the evidence goes to shew that she would have probably lived longer if she had not been attended by the appellant; that is to say that his treatment shortened her life. No one has a right to shorten by an hour the life of a human being except where there is lawful authority, as where sentence of death has been passed.

The question is whether there was evidence on which the appellant could be convicted of manslaughter. In *Williamson,* Lord Ellenborough C. J. said: "To substantiate that charge the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention." Personally, I do not think Lord Ellenborough ever used the word "*most* criminal inattention," but if he did so the passage is taken from a summing up to a jury, and if he had been delivering a judgment he would not have discriminated between inattention which was most criminal or only slightly criminal.

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The rule is laid down in a way which we all think adequate in *Spiller*, where Bolland B. said: "As to the question, whether it be manslaughter or not, the judges have considered that any person, whether licensed or unlicensed, who deals with the life or health of any of his Majesty's subjects, is bound to use competent skill, and sufficient attention; and if the patient dies for the want of either, the person is guilty of manslaughter." That was in giving the ruling of the judges; in summing up he said: "The law as I am bound to lay it down . . . . is this—if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity." Of course, in cases where the man indicted is a qualified medical man, it would be very difficult to prove that he has not the requisite skill, as if he had not he would not have passed his examinations, but even such a person may conceivably not apply his skill properly. But here we are clearly dealing with a man of no knowledge; his own answers in evidence shew him to be ignorant over and above most people. He thought he could cure difficult diseases by fantastic means; he knows nothing about diseases of the heart, and never thought of examining the heart before prescribing treatment. He had a stereotyped practice of prescribing cold water and fasting. The patient died, and the evidence shews that she died prematurely as the result of such treatment. The verdict was therefore warranted by law and by the evidence.

On the question of sentence, we have come to the conclusion that twelve months' imprisonment is no more than the appellant deserved. It is essential that such quacks should not be allowed to go unpunished. With regard to hard labour, the appellant is a violinist, and it is inexpedient that he should have to give up that profession, which might result in his following these dangerous practices again. The sentence will therefore be twelve months' imprisonment in the second division.

Sentence reduced.

Solicitors for Appellant—*Pierron and Morley.*

A. L. B. T.

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ARTHUR JAMES NORRIS.

When a jury finds that the "explanation" of a defendant charged with feloniously receiving stolen property "may reasonably be true," the Court, if it thinks that there was no corroboration of an accomplice's evidence, will quash the conviction.

This was an appeal against conviction on the certificate of the Deputy-Chairman of the Middlesex Sessions, who tried the case. Appellant was convicted on the 2nd August, 1916, at those sessions, of feloniously receiving stolen property; sentence was postponed.

Bryan for the appellant (under s. 10 of the Criminal Appeal Act), who was not in custody. The appellant was indicted with a man named Gurney—Gurney for stealing, and the appellant for receiving, knowing it to have been stolen, a horse, the property of one Fletcher. Gurney pleaded guilty. The evidence shewed that the horse was stolen on the 7th July, and that the appellant was in possession of it the same evening, having bought it from Gurney. The appellant said he had given £3 10*s.* for it, Gurney said he was only paid £1, but later admitted that the appellant had promised to pay him the balance of £2 10*s.*

The Deputy-Chairman misdirected the jury by putting a number of questions to them; the following are the questions and the answers given by the jury:—

(1) Was the pony stolen by Gurney? Yes.
(2) Was the prisoner, Norris, in possession of the pony shortly after it was stolen? Yes.
(3) Is the explanation given by Norris one which may reasonably be true? Yes.
(4) Is such explanation true in fact? No.
(5) Has, in your opinion, the evidence of Gurney been corroborated in material particulars implicating the accused? Yes.
(6) Has the prosecution satisfied you that the defendant is guilty? Yes.

On the answer to the third question the appellant is entitled to an acquittal. *Abramovitch*, 84 L. J. K. B. 396; 59 S. J. 288; 31 T. L. R. 88; 11 Cr. App. R. 45 (1914). The Deputy-

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Chairman said that he thought they would have the pleasure of hearing the death-knell of *Abramovitch* in consequence of this verdict.

The jury were at first unable to agree on their answer to the fifth question, and only answered it after the Deputy-Chairman had told them that the question was not one that he thought would have any particular influence. He had not previously given any sufficient direction on the question of corroboration. There was, in fact, no corroboration of the accomplice's evidence on any material particular implicating the accused. There was corroboration of the statements that Gurney sold the appellant the horse, and that the latter was found in possession, but these matters were not in dispute.

W. A. Casson for the Crown. The demeanour of the appellant when he gave evidence was sufficient corroboration of the evidence of Gurney; there is also the fact that the appellant failed to give a satisfactory explanation of his possession.

AVORY J.: The appellant was charged with receiving a pony, well knowing it to have been stolen. The charge was one of the most simple in the criminal law, and required a simple explanation to the jury. Generally it is enough to say that it is not a crime merely to be in possession of stolen property; the essence of the charge is that the defendant should be proved to have known at the time that it had been stolen. Unfortunately this, which seemed a simple case, was developed at the trial into a most complicated one owing apparently to the inability of the Deputy-Chairman to understand the decision of this Court in *R.* v. *Abramovitch*, one not difficult to understand. The only question in that case was on which side lay the burden of proof. The Court there pointed out that the burden of proof lay always on the prosecution to establish to the satisfaction of the jury that the defendant knew that the goods were stolen at the time when he received them. The question whether he has given a satisfactory explanation of his possession is to be taken into consideration as evidence shewing whether he knew that they had been stolen or not. Instead of pointing out to the jury that the prosecution had to satisfy them that the appellant knew that the pony had been stolen, and drawing attention to the evidence

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on that issue, the Deputy-Chairman thought it right to put six questions to the jury. Whether they understood the third question is very doubtful. They did say that Gurney stole the pony and that the appellant was in possession, but these questions were unnecessary, as the matters were not disputed. They also said that the explanation given by the appellant, which was to the effect that he believed Gurney to be honestly in possession of the pony, might reasonably be true, an answer which it is impossible to reconcile with the further answer that the explanation was not true in fact. The fifth question was, "Has, in your opinion, the evidence of Gurney been corroborated in material particulars implicating the accused?" The Deputy-Chairman left this question to the jury without any sufficient explanation of the nature of the corroboration required, and in fact told them that the possession of the pony by the accused might be regarded as corroboration in a material particular, and the jury, after considerable hesitation, having come into court unable to agree on the point, and after having been told it was not of much importance, said "Yes." Finally they said that the prosecution had satisfied them that the appellant was guilty.

In this case the question of corroboration of the accomplice was all-important; Gurney was a witness who required corroboration in the strictest sense. We have in vain called on Mr. Casson to shew us corroboration of the only question which was in dispute in the case, namely, whether the appellant knew that the pony had been stolen. There was no dispute that he had received it and had bought it. In these circumstances the Court, acting on the principles laid down in such cases, is of opinion that the conviction must be quashed, as there was no corroboration of the accomplice to justify the answer to the fifth question.

Conviction quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE LOW.

CHARLES WHEELER.

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Evidence given between a plea of guilty and sentence is given at a "stage of the proceedings" within s. 1 of 61 & 62 Vict. c. 36, the Criminal Evidence Act, 1898. Therefore a witness on oath at that point of the hearing is "lawfully sworn" within s. 1 (1) of 1 & 2 Geo. 5, c. 6, the Perjury Act, 1911.

S. 2 of the Criminal Evidence Act does not exhaust the opportunities for defendant giving evidence on oath.

A statement made with a view to securing a mitigation of sentence is "material in the proceeding": s. 1 (1) of the Perjury Act, 1911.

Appeal against conviction, on certificate.

The appellant was convicted on July 22nd, 1916, before the Recorder at the Central Criminal Court, of perjury, his sentence being postponed pending this appeal.

Vachell, K.C. (with him *Curtis Bennett* and *J. A. C. Reeves*), for the appellant: In February, 1916, the appellant appeared before the Acton justices on a charge under the Sale of Food and Drugs Act, 1875, of having sold to an inspector under the Act milk which was deficient in fat. A solicitor appeared on his behalf, and on hearing the charge at once pleaded guilty. The prosecuting inspector made an opening statement of his case to the Bench. In the course of that statement he suggested that the deficiency of fat in the milk was due to the mixture of separated milk with new milk. He then gave evidence of a formal character, namely, of the purchase of the milk and of the performance of the conditions required by the Sale of Food and Drugs Act, 1875. The appellant's solicitor then addressed the Bench, and in the course of his statement denied that the appellant had mixed separated milk and new milk, and said that he had not bought any separated milk for a year. The inspector thereupon said:

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"I wish he would go into the box and say so, as I have information that he has." The appellant thereupon entered the witness-box and said that which was admittedly untrue, namely, that he had not purchased any separated milk for twelve months. Then his solicitor informed the Bench that the appellant had been convicted on three previous occasions of similar offences under s. 6 of the Sale of Food and Drugs Act, 1875 [which might render him liable to imprisonment under s. 17 (2) of that Act, 1899]. The justices then fined the appellant £40.

On July 22nd, 1916, at the Central Criminal Court, the appellant was tried upon an indictment which charged him with "perjury contrary to s. 1 (1) of the Perjury Act, 1911, the particulars being that on February 16th, 1916, being a witness in a judicial proceeding before a Court of Summary Jurisdiction, he knowingly and falsely swore certain matters [viz., that he had not purchased separated milk for twelve months]. At the conclusion of the trial he was convicted of the offence, and the Recorder gave his certificate that the case was a fit one for appeal.

It is submitted that the conviction cannot be maintained, since the appellant was not lawfully sworn as a witness in the proceedings before the justices within s. 1 (1) of the Perjury Act, 1911, under which he was charged. By s. 21 of the Sale of Food and Drugs Act, 1875, the defendant in proceedings under the Act could be called as a witness, but the Criminal Evidence Act, 1898, supersedes that section, and by s. 1 regulates the giving of evidence by an accused person. The appellant did not give evidence at a "stage of the proceedings" within that section. "Every stage of the proceedings" means, not every point of time in the proceedings first in the police court, then at the trial, and possibly in the Court of Criminal Appeal, but refers to such proceedings in the different courts as stages in the proceedings by the Crown against the defendant as a whole. S. 2 of the Criminal Evidence Act, 1898, then fixes the time for the calling of the defendant, that is, immediately after the close of the evidence for the prosecution. The effect of these sections is, therefore, that unless a defendant is sworn as a witness before his advocate opens his case in one of the courts into which the proceedings are taken, he cannot be said to be "lawfully sworn as a witness" within s. 1 (1) of the Perjury Act, 1911. The appellant was not called as a witness in the police court until

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his solicitor had already commenced his statement, and was therefore not a competent witness, and cannot be convicted of perjury for any false statement in his evidence. *Clegg*, 19 L. T. 47 (1868). Moreover, the words "stage of the proceedings" do not apply to the period between a plea of guilty and sentence, *Hodgkinson and Manning*, 64 J. P. 808 (1900), and as the appellant had pleaded guilty before he entered the witness-box he was not "lawfully sworn."

The evidence given by the appellant was not material in the proceeding before the justices. He was merely allowed irregularly to go into the witness-box to answer the challenge made to him by the prosecuting inspector as to the cause of the deficiency in fat. It was to answer the inspector he gave evidence, not to influence the justices in the punishment they inflicted. Even if he wished to secure mitigation of punishment he could not be convicted of perjury in respect of a false statement made with that object. *Tate*, 12 Cox C. C. 7 (1871). They also referred to *Gibbons*, 31 L. J. M. C. 98; 8 Jur. (N. S.) 159; 5 L. T. 805; 10 W. R. 350; 12 Cox C. C. 105 (1862); *Baker*, 1895 1 Q. B. 797; 64 L. J. M. C. 177; 72 L. T. 631; 43 W. R. 654; 15 R. 346; *Hewitt*, 9 Cr. App. R. 192 (1913); and *Bright*, 12 Cr. App. R. 69 (1916).

Travers Humphreys (with him *G. Cecil Whiteley*) for the Crown: It is submitted that the words "at every stage of the proceedings" in s. 1 of the Criminal Evidence Act, 1898, mean at every stage of the proceedings where the defendant is a party to the proceedings. There is no reason why the Court should say that the proceedings in a criminal case end at any time before the Court delivers its judgment. S. 2 of the Act of 1898 is merely a procedure section. It deals with what is to happen in a certain event, viz., "where the only witness to the facts of the case called by the defence is the person charged." It does not state the one and only period in a trial at which the accused person can lawfully be sworn and give evidence.

Vachell, K.C., replied.

The LORD CHIEF JUSTICE: The question for our decision raised in this case is whether the false statement made by the appel-

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lant was made upon an oath lawfully sworn in the course of judicial proceedings. The first point taken by Mr. Vachell is that the appellant was called after the issue in the case was determined, that is, after he had pleaded guilty, and that any statement he made in those circumstances was not a statement which he was competent to make. In other words, it is said that he was not a competent witness when he was called. The second point was that the statement made by the appellant was not material to the issue or to the proceedings. On the first point it has been argued that the Criminal Evidence Act, 1898, which enabled a prisoner to be called, at any rate in the majority of cases, for the first time in the history of our law, only allowed him to be called at a certain time and in a certain way. The words in s. 1 of the Criminal Evidence Act, 1898, "at every stage of the proceedings," are very wide words. It is said that they must be limited to the proceedings in the different courts, but this Court can find no reason for adopting such limitation. The words are used to enable an accused person to give evidence "at every stage of the proceedings" where it would be proper for his evidence to be given; that is to say, for instance, not in proceedings before the grand jury in which the defence does not take part. In other words, wherever the defence can be heard, the prisoner can be a witness on his own behalf.

It was argued that by s. 2 of the Criminal Evidence Act, 1898, the appellant could only be called at the close of the case for the prosecution, and that as he was called after that time he was not a "competent witness" within s. 1, and consequently could not be "lawfully sworn" within s. 1 (1) of the Perjury Act, 1911. But that argument loses all its force when s. 2 of the Criminal Evidence Act, 1898, is given its true meaning. The whole basis of the argument was that s. 2 is exhaustive about the time at which a prisoner can be called as a witness. The object of the section is to prescribe that if the prisoner is to be the only witness called for the defence, he must make his statement upon oath before his advocate makes his speech. But nowhere outside that section, having regard to the scope of the Act and the wide language of s. 1, can one find provision to the effect that the prisoner can only be called at this time if it is intended to call other witnesses for the defence. It is very difficult to say that, in an enabling Act of this kind, the legislature wished

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to prevent the prisoner giving evidence except at this particular time in all cases or that he cannot go into the witness-box after he has pleaded guilty. It would be a hardship to the prisoner.

The only question remaining for our decision is whether evidence in mitigation of punishment is evidence given in a "stage of the proceeding." There is no doubt that it is. The proceedings continue certainly until passing of sentence. The Court also think that the statement of the appellant was "material in that proceeding," inasmuch as it was made in order to influence the minds of the justices and to persuade them to inflict a punishment lighter than they would otherwise have done. In our view all the elements of an offence under s. 1 (1) of the Perjury Act, 1911, are present, and this appeal must be dismissed.

Our attention has been called to a number of authorities. In *Hodgkinson* (above), Darling J. no doubt took the view that a prisoner was not competent under the Criminal Evidence Act, 1898, to give evidence on oath in mitigation of sentence after he had pleaded guilty, since the period between a plea of guilty and sentence was not a "stage of the proceedings." But a perusal of the case shews that the judge came to that conclusion upon the statement of counsel who appeared for the Crown, which he appears to have accepted without argument. The case was discussed in *Bright* (above), where Darling J., as president of the Court of Criminal Appeal, expressed a doubt whether it was good law. Mr. Vachell also relied upon *Tate* (above). That case has already formed the subject of consideration in this Court in *Hewitt* (above), where the Court, without in terms dissenting from it, doubted whether it had been rightly decided. In none of the cases cited to us is there that which could lead this Court to say that the evidence given by the appellant was not "material in that proceeding" within s. 1 (1) of the Perjury Act, 1911, or that the appellant was not "lawfully sworn" in the sense that he was not a "competent witness" to whom the oath had been administered in the proper way.

For these reasons the case will be remitted for sentence.

Appeal dismissed.

G. B.

Solicitors for the Appellant—*W. T. Ricketts & Son.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING. AND MR. JUSTICE ATKIN.

1916
6 *November.*

FREDERICK ARTHUR ERNEST FOSTER.

The certificate under s. 102 (3) *of* 8 *Edw.* 7, *c.* 67, *which enables a court to sentence a person under the age of fourteen years to imprisonment ought not to be granted merely because no "place of detention" within ss.* 106, 108 *of that statute has been provided.*

This was an appeal against sentence, by leave of Atkin J. Appellant was convicted on the 17th October, 1916, at the Hertfordshire Sessions, holden at St. Albans, of larceny, and was sentenced to six months' imprisonment.

Roland Burrows for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted for four offences, and pleaded guilty to two offences of pilfering cigarettes. He is fourteen years of age, and is therefore a "young person" within the meaning of s. 131 of the Children Act, 1908, 8 Edw. 7, c. 67. Under s. 102 (3) of the Act he could not be sentenced to imprisonment unless the court certified that he is of "so unruly a character that he cannot be detained in a place of detention" provided under the Act, or "that he is of so depraved a character that he is not a fit person to be so detained." The Court did so certify, but there was no evidence upon which the certificate could be based. He could have been sentenced to be detained in "a place of detention" (ss. 106, 108), but none for tuberculous boys has been provided by the county. Under s. 57 he might have been sent to a reformatory, but no reformatory will admit him because he is tuberculous. He was sent to prison in his own interests for consumption treatment.

R. Walker for the Crown. I cannot support this sentence: the attention of the Court at the trial was not drawn to the section.

Under s. 107 (d) the boy might be handed over to some fit person if such a person can be found.

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The LORD CHIEF JUSTICE: The case will be adjourned, and the boy will remain in the infirmary in the meantime. We will then say what shall be done with him in place of imprisonment, which will not be allowed to stand.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE ATKIN.

1916
27 *November.*

The Court now set aside the sentence and bound the appellant over on his own recognisance in the sum of £5 to be of good behaviour, to keep the peace for twelve months, and to come up for judgment of the Court of Criminal Appeal if called upon so to do within the twelve months.

In reply to a question by the LORD CHIEF JUSTICE, appellant said that he was willing to go to a Christian Mission Home for Boys.

Sentence substituted.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE ATKIN.

1916
13 *November.*

RICHARD NORCOTT.

Pressure to state the cause of visible mental disturbance is not an "inducement" which will invalidate a "complaint" in the case of a sexual offence. **Osborne, 1905, 1 *K. B.* 551, *explained.***

Appeal against conviction and sentence.

The appellant, Richard Norcott, was convicted on October 16th, 1916, before the Chairman, at the Knutsford Quarter Sessions, of unlawfully and indecently assaulting a female, to wit, one Florence May Hollingworth, described by counsel as his illegitimate daughter, and sentenced to six months' imprisonment with hard labour.

T. E. Morris for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The substantial ground upon which this appeal is based is that inadmissible evidence was admitted on behalf of the prosecution at the trial of the appellant. The evidence given at the trial by the girl Hollingworth, who was seventeen years of age, was to the effect that on June 26th, 1916, the appellant came into her bedroom when she had been in bed for some time and got into bed with her, saying that he could not sleep in his own room as there was music going on next door. The witness tried to get away, but the appellant asked her to stay and said that he was cold. He then held her tight and attempted to push his legs between hers. The witness then got away from him and went into her younger sister's room. When asked by the child if anything was the matter, she replied: "Hush, and I will tell you in the morning." Next morning,

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RICHARD NORCOTT.

Reading L.C.J. Darling J. Atkin J.

however, she said nothing, but went to see a Miss Davies, who was a woman much older than herself and had been a friend of her mother, who had died some time previously.

Miss Davies, in evidence, at the trial, said that Hollingworth came to see her on the morning of June 27th, 1916. She appeared very much upset, and the witness asked her what was the matter and why she had been crying. The witness continued: "She would not tell me, so I asked her why, and she said, I do not like to, for you will laugh at me if I do.' I said, 'Tell me what it is, Florence,' and she said, 'No, I do not like to.' I got hold of her bicycle and said, 'I won't let you go until you do tell me.' I looked the same as I do now. She was not afraid of me when I told her I should not laugh at her. She then told me her father had been in her room and got into her bed, and that after some trouble she had got away."

It is submitted that this evidence of Miss Davies was inadmissible. Evidence of a complaint in these cases is not admissible when the complaint has been elicited by questions of a leading, inducing or intimidating character, *per* Ridley J. in *Osborne*, 1905 1 K. B. 551, at p. 561. It is clear that the questions put by Davies in this case were "inducing" questions, and that the girl was persuaded thereby to make a statement which she was unwilling to make. Moreover, if the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. *Per* Ridley J. in *Osborne*, above, at p. 556. Here, as has been said the girl was loth to make any statement, and only did so on being pressed by Davies. [He also referred to *Lillyman*, 1896 2 Q. B. 167; 65 L. J. M. C. 195; 18 Cox C. C. 346; 60 J. P. 536.]

A. M. Latham for the Crown was not called upon to argue.

The LORD CHIEF JUSTICE: It has been argued on behalf of the appellant that such evidence as is complained of here must, to be admissible, come within the rules laid down in *Lillyman*, above, and *Osborne*, above. It is said that there are limitations upon the admissibility of such evidence which are stated in the judgment of the Court in *Osborne*, and that the evidence in this case does not come within such limitations and was inadmissible. Counsel has contended that the witness Davies induced the girl Holling-

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worth to tell her story, and, therefore, that the statement so made was not a complaint, and that the girl was an unwilling narrator of her story.

It is, of course, very difficult to draw a precise line in these cases. It must depend very much upon the circumstances of each case, but, nevertheless, there is a principle which is laid down in *Osborne*, above, at p. 556, where Ridley J. says: "The mere fact that the statement is made in answer to a question in such cases is not in itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible; but a question such as this, put by the mother or other person, 'What is the matter?' or 'Why are you crying?' will not do so. These are natural questions which a person in charge will be likely to put; on the other hand, if she were asked, 'Did So-and-so' (naming the prisoner) 'assault you?' 'Did he do this and that to you?' then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first."

At a later part of the judgment the learned judge (at p. 561) said that the judgment of the Court that evidence of complaint was admissible applied "only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself." It is within these last words that counsel seeks to bring his case. He does not suggest that the questions were leading or that there was any intimidation or that the complaint was not made at the first reasonably possible opportunity. But he does say that Davies induced Hollingworth to make her statement.

It appears to us that it never was intended that "induced" should be interpreted as referring to a statement made by the prosecutrix in answer to any question or to a question which led

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her to make her complaint. What the Court did mean to refuse to admit was evidence of a complaint made in answer to questions of a suggestive or leading character. It is obvious why the Court should take that view. This evidence is admitted as being evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and in that way is regarded as some evidence that her story is probably true. But the Court meant to guard against the admission of evidence of statements which have really been put into the girl's mouth. The question for the Court is whether the statement made by the girl is spontaneous in the sense that it is her unassisted and unvarnished story of what happened. That she may have been persuaded to tell her unassisted and unvarnished story is no reason why the evidence of her having made the statement should be rejected. Consideration of the judgment in *Osborne* shews that that is so. At p. 556, Ridley J. says: "A question such as this, put by the mother or other person, 'What is the matter?' or 'Why are you crying?' will not do so" (*i.e.*, render the evidence of complaint inadmissible). "These are natural questions which a person in charge will be likely to put; on the other hand, if she were asked, 'Did So-and-so' (naming the prisoner) 'assault you?' 'Did he do this and that to you?' then the result would be different and the statement ought to be rejected." With that view this Court is in entire agreement. The learned judge then proceeds: "In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge." In this case Miss Davies stood very much in the position of the girl's mother. She tried to befriend the girl and get her to tell her what had upset her. Never for one moment did she either lead the girl into making a statement about the assault or suggest to her that there had been an indecent assault. She only tried to get her to tell her story whatever it was. The evidence is not inadmissible because questions were put to the girl which might have had the effect of persuading her to tell her unassisted and unvarnished story.

In our view, therefore, all the circumstances of this case bring the evidence within the region of admissibility. In *Osborne*, at p. 556, occur these words: "If the circumstances indicate that but for the questioning there probably would have been no

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RICHARD NORCOTT.

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voluntary complaint, the answer is inadmissible." If that sentence is taken by itself, as we do not think it was ever intended to be, it goes too far. It must be read with the immediately preceding sentences and must be qualified by them. It clearly never was meant that the mere fact of the questioning would make the statement not a voluntary complaint, because only nine lines above the judge said that the mother or other person can put questions such as "What is the matter?" or "Why are you crying?" We desire to guard against its being thought that that sentence is to be taken as the judgment of the Court in *Osborne*. It is only part of that judgment, which must be read with its context.

In our view the evidence of which the appellant complains was rightly admitted, and, therefore, this appeal fails.

Appeal dismissed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE ATKIN.

THOMAS AUSTIN AND JOHN BAILEY DAVIES.

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20 *November.*

On a charge of receiving stolen property the jury must be satisfied that the property was stolen, but the facts may be such that the judge summing up may assume that it was stolen.

Such an irregularity as the interposition of a person in court interrupting a witness and making an unsworn statement about the case in hearing must be objected to by counsel at once.

It is essential that the shorthand writer should take down and transcribe every word said at the trial by those whom it is their duty to report and record every incident thereat.

These were appeals against conviction on points of law. Appellants were convicted on the 5th October, 1916, at the Sheffield Sessions, of feloniously receiving stolen property. Austin was sentenced to six, and Davies to twelve months' imprisonment with hard labour.

Compston, K.C. (with him *Paley Scott*), for the appellants, who were not present. The appellants were indicted with two other men, Rippon and McKane, for the larceny of 740 lbs. of high-speed steel scrap, the property of Spear and Jackson, Ltd., on the 22nd August. There was a second count for receiving. McKane was acquitted, the other three prisoners were convicted of receiving. Rippon, who does not appeal, was bound over, as he was just about to be called up for military service. Austin and Rippon were general dealers, who bought up any metal scrap; Davies was a director of Mirfin & Co., Ltd., manufacturers.

According to the evidence for the prosecution, on the 22nd August the police, who were watching the premises of Mirfin & Co., Ltd., saw, at 9 a.m., Davies, Austin and McKane in the

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archway, when Rippon drove up with a horse and cart which belonged to Austin. The cart was backed into the yard, where the police were unable to see it. After a short time Davies and McKane came out and looked up and down the street; they then went back, and Rippon drove the cart out. At 10.25 on the same morning Austin came to the gate and made a signal, upon which Rippon returned, driving the cart, which was backed into the yard. The police followed in and found, as they said, Austin and Rippon lifting a sack out of the cart. They asked Austin what he was doing, upon which he ran away, but was followed by the police and caught. The police searched the premises and found 325 lbs. of high-speed steel scrap inside the testing room, and 415 lbs. in the cart in the yard of the premises. Of these, 13½ lbs. were identified as being the property of the prosecutors, and as having been on their premises on the 24th July.

The explanation given by the prisoners was that Rippon's pony had been stolen that morning, and evidence was given that the matter had been reported to the police; that he borrowed Austin's horse, which cast a shoe in the morning; that he thereupon left the contents of the cart in the yard while he took the horse to be shod, and that the sack which the police said was being removed from the cart was being replaced in it. With regard to the 13½ lbs. identified as being the property of the prosecutors, it was suggested that it might have been thrown away through the negligence of some workman, and so reached the tip. Evidence was given by two women that they had picked such scrap off tips and sold them to Rippon.

I submit that there was no evidence that even the 13½ lbs. of scrap were ever stolen; negligence on the part of a workman was an explanation as consistent as that of theft. If there was any such evidence the recorder misdirected the jury by assuming as a fact that the scrap had been stolen, instead of leaving the question to them. He said, "You know it has been stolen by somebody, that 13½ lbs. Somebody has stolen it, and it is for you to consider whether it is probable that any thief, having stolen it, would go and deposit it on a tip."

There was no evidence that this property was in the possession or under the control of Austin or of Davies, and the recorder failed to give any direction to the jury of what in law constitutes possession or control. As regards the scrap found in the

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testing room of Mirfin & Co., Ltd., where an employee of the company, named Gambles, was testing it. It may have been in Gambles' possession on behalf of the company, but there was no evidence of any control by Davies. In such a case, *Pearson* (No. 2), 72 J. P. 451; 1 Cr. App. R. 79 (1908) is conclusive in my favour. See also *Berger*, 31 T. L. R. 159; 34 L. J. K. B. 541; 11 Cr. App. R. 72 (1915).

An extraordinary incident happened while evidence was being given for the defence by a woman, that she had picked up such scrap from tips, and from a roadway. A man named Morgan West interposed, and was allowed by the recorder to make a statement, not on oath, that the ground there was just beneath the private tip of his firm, and that no one had any right to take scrap from there. It is impossible to say that the jury were not influenced by his statement, and the conviction should be quashed. *Gibson*, 18 Q. B. D. 537; 56 L. J. M. C. 49; 56 L. T. 367; 35 W. R. 411; 16 Cox C. C. 181; 51 J. P. 742 (1887). No warning was given to the jury that they should disregard this statement.

(Several other points were taken by counsel for the appellants which are not material for the purposes of this report, and on which counsel for the Crown was not called upon to argue.)

Roland Oliver for the Crown. No doubt it would have been better if the recorder had left to the jury the question whether the 13½ lbs. were stolen. I was not at the trial, so cannot say if the point was raised there. The real issue at the trial was whether the account given by the police, or that given by the prisoners, was the true one. The evidence given by the appellants was in flat contradiction of the evidence of the police on nearly every point.

If the jury accepted the evidence of the police, no direction was necessary on the question of possession or control, because the facts deposed to by them clearly established possession. The point was clearly before the jury, as there was cross-examination and argument on the question. In such a case the Court will not quash a conviction even though no specific direction was given: *Cook*, 8 Cr. App. R. 91 (1912). The notice of appeal, which was evidently settled by a lawyer, contains no reference to either of these points.

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Avory J.
Atkin J.

I cannot understand the interposition of Morgan West, and it is clear that the shorthand note is incomplete on this point. No objection seems to have been taken, and although his statement was quite irregular, it does not seem to have been of any importance, and cannot have affected the interests of the appellants. Therefore the proviso to s. 4 of the Criminal Appeal Act should apply.

Compston, K.C.: Although no objection was raised by counsel at the trial to Morgan West's statement, *Gibson* shews that it is open to argue the point on appeal.

[The LORD CHIEF JUSTICE: That case was decided before the Court of Criminal Appeal came into existence. This Court will not allow counsel to stand by and allow a point to go by without raising objection, thinking that it may help his case, and then, through another counsel, to raise the point on appeal.]

The statement amounted to evidence contradictory to the evidence of the woman called for the defence, and therefore must have influenced the jury.

The LORD CHIEF JUSTICE: The appellants, Thomas Austin and John Bailey Davies, together with a man named Rippon, who was also convicted, and another named McKane, who was acquitted, were tried on a charge, firstly of stealing, and secondly of receiving, well knowing it to have been stolen, 740 lbs. of high-speed steel; both were convicted. The case comes before us as an appeal against conviction on points of law, and a number of points have been taken by Mr. Compston, who appears for both appellants. Before we deal with those points it is desirable to keep clearly in mind that Austin is a dealer in metal, and Davies a director of a company carrying on business as steel manufacturers under the name of Mirfin & Co., Ltd.; Rippon is also a dealer.

On the 17th August the police, who were watching the premises of Mirfin & Co., Ltd., saw both Austin and Davies there, and Rippon arrive with a cart, which appeared to contain light scrap, but when it was backed into the yard the load seemed to be a heavier one. When it came out sacks were seen lying in the

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cart, the suggestion being that there had been heavy material in the sacks, which had been taken out of them.

The evidence shewed that on the 22nd August the police were again watching the premises, saw Austin and Davies there, and then saw Rippon arive with Austin's cart, which he took into the yard; he then went away with it and returned later. The police then came in and saw Austin and Rippon lifting a bag out of the cart, and Davies standing within three yards of them. There was then a conversation, on which there is a controversy; the police asked Austin questions and Austin ran away. The police followed him and caught him within forty or fifty yards. Then questions were addressed by the police to Davies, who gave answers which were contradictory. Eventually the appellants and the other two men were charged, and the defence set up was that the story told by the police was untrue, and an explanation was given by both appellants to the jury of their connection with the matter which, if the jury accepted it, would relieve them entirely of any responsibility for the theft.

Without travelling through the evidence, it is clear to us that the case was fought on the question whether the jury accepted the testimony of the police or of the defendants, and it is important to bear that in mind. The first point taken by Mr. Compston is that there was no evidence that the property was stolen, and his criticism is that the recorder stated in his direction to the jury that the steel had been stolen, instead of leaving the question to be determined by them. At first sight it seemed to us that there might be some point with reference to the recorder's statement on this part of the case. He does seem to have treated it as though the question was beyond dispute. But when one regards the evidence that is not a matter for surprise. The case was tried before a Sheffield jury, who would know a good deal about high-speed steel, and would know that it is not thrown away on a scrap heap. Here the evidence established that four pieces, weighing 13½ lbs., belonged to a Sheffield firm, who had never sold that steel. They had last seen it on the 24th July. Some time between the 24th July and the 22nd August it had been taken from their premises. The suggestion was made that workmen are sometimes negligent, and one of them may have thrown the steel away, and that so it found its way to the scrap heap; that it may have been picked up and sold, and so found

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its way to the possession of the defendants. On the other hand, it was said that this was impossible, and it certainly was impossible if one believes the evidence of the police and remembers the unsatisfactory answers of Davies, and the fact that Austin ran away. It seems to us that there was abundant evidence that the property was stolen, and in the circumstances no legitimate grievance can be made of the fact that the recorder gave no direction on this point. If the point could have been taken at the trial, it is impossible that one of the counsel engaged would not have raised it, and addressed the jury on the subject; if he had done so the recorder would not have taken it as admitted. So we think that the first point fails.

The next point is that there was no sufficient evidence that the property was in the control or possession of either Austin or Davies. The comments already made on the conduct of the case are an answer to this point. If the evidence of the police was accepted it was unnecessary to give a direction on what in law constituted possession. The only difficulty arises from the evidence given for the defence. Once it becomes clear, as it does, that the jury accepted the evidence of the police it is impossible for us to hold that the failure to give a direction on the subject justifies us in quashing the conviction.

The last point taken arises with reference to the statement by Morgan West, the foreman of Andrews & Co. Morgan West was bound over to give evidence by the magistrates, but he was not called. In the course of the defence a woman was called, and gave evidence that she was in the habit of picking up scrap from tips and from another place beyond a tip, where scrap had been used for making a road; she referred to Andrews's tip. Morgan West, in some unexplained way, interposed and made a statement, without being sworn, that the woman had no right to take anything from the tip. It is contended by Mr. Compston that this prejudiced the defendants' case to such an extent that the conviction ought to be quashed. We are satisfied that more took place than appears on the shorthand note; it is impossible to say what, because none of the counsel who appeared in the court below are here. But we are also satisfied that the statements made by Morgan West cannot have prejudiced the appellants' case. The question was whether the police were to be believed; the only statement made by Morgan West was that

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women were not allowed to pick scrap from Andrews's tip. The jury knew that there were several other tips, and the defence raised was not that the scrap had been taken from Andrews's tip, and therefore on this point also the appeal fails.

We desire to draw the attention of the shorthand writers of the courts to the necessity for reporting everything which happens in the court. It is clear here that everything is not on the note; something further must have taken place; it is also evident that what is on the note is not quite correctly reported. Without making any reflection on the shorthand writer in this case, we wish to remind shorthand writers generally that it is of the utmost importance that they should record every word which is spoken at the trial.

In our opinion there has been no miscarriage of justice; these appeals must be dismissed.

Appeals dismissed.

Solicitors for the Appellants—*Jaques & Co.*, for *Porrett and Fawcett*, and *Chambers & Sons*, Sheffield.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE ATKIN.

1916
27 *November.*

JOHN MAYES.

Severity of sentence—First term of penal servitude.

On October 16 the appellant, John Mayes, was convicted before the recorder, at the Leicester Sessions, of shopbreaking, and was sentenced to five years' penal servitude. He now appealed against his sentence.

No counsel appeared and appellant was not present.

ATKIN J.: From the evidence it appears that the appellant broke into a pawnbroker's shop by night with five associates, and stole a quantity of watches and chains and other articles. At the trial he pleaded guilty to the charge of shopbreaking, and the police gave him undoubtedly a very bad character. It was said that he had originated this particular crime, and that he had been convicted on a number of occasions, beginning in 1911, for larceny and for loitering with intent to commit a felony, his last conviction having been on May 29, 1916. The longest sentence that he had ever received before the conviction with which we are dealing to-day was one of three months' imprisonment. He is now sentenced to five years' penal servitude. We do not wish to lay down any rule in respect of what a first sentence of penal servitude should be, but we think, taking all the facts here into consideration, and taking into account the youth of the ap-

pellant—he is only 24 years of age—that, although his record is bad, a sentence of five years' penal servitude was too severe, and that it should be reduced to one of three years' penal servitude.

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JOHN MAYES.

Atkin J.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE ATKIN.

1916
4 *December.*

ARCHIBALD CHARLES HENRY FOX.

Severity of sentence after previous convictions, mitigated in view of youth.

Appeal against sentence.

The appellant was convicted on November 17, 1916, before Mr. Justice Rowlatt, at the Bristol Assizes, of shop-breaking, and was sentenced to five years' penal servitude.

The indictment charging the appellant alleged that on October 7, 1916, he broke and entered the shop and warehouse of Messrs. Cole and Pottow, of Bristol, with intent to steal therein. The appellant pleaded guilty. It appeared that at 3 a.m. on the morning of the day in question the appellant was seen with an electric torch examining Messrs. Cole and Pottow's premises. The premises were surrounded by police, and at 5 a.m. the appellant was found lying on a wall at the back. Apparently he had made an entry by climbing on to a shed and breaking a window in the warehouse. The appellant said that he was under the influence of drink at the time.

The appellant in person.

The Crown was not represented.

THE LORD CHIEF JUSTICE: The appellant, aged 27, was arrested on the premises with the breaking and entering of which he was charged, and there is no dispute that he actually committed the offence. Undoubtedly the sentence passed upon him was a severe

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one, but his record since the age of fifteen has been a bad one. In February, 1905, he was convicted of stealing, and was bound over. In November, 1905, he was again convicted of stealing, and sent to a reformatory for four years. In 1911 he was sentenced to twelve months in a Borstal institution for stealing. On four occasions in 1913 he was convicted for warehouse- and shop-breaking, stealing, and being found on enclosed premises, and was sentenced on the last occasion to two sentences of nine months' imprisonment, to run concurrently. In 1914 and 1915 he was convicted of counting-house breaking, and sentenced to two sentences of twelve months' imprisonment in the second division. He is, however, still so young that we will reduce his sentence from five to three years' penal servitude, in the hope that he will reform.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE ATKIN.

FREDERICK ARTHUR GOLDING AND JAMES ALLPORT.

1916
11 *December.*

Severity of sentence.

The appellants, Frederick Arthur Golding and James Allport, pleaded guilty on October 18, 1916, before the Chairman at the Monmouthshire Quarter Sessions, to housebreaking, and were sentenced to five years' penal servitude and three years' penal servitude respectively. They appealed against these sentences.

G. St. J. McDonald for the appellant Golding (under s. 10 of the Criminal Appeal Act), who was not present. From the evidence of the depositions it appears that both the appellants admitted entering the house of one Elizabeth Ann Light, at Ebbw Vale, and stealing therefrom property to the value of £15. After receiving certain information, the police went to the house in which Golding occupied a room and found there most of the property which was stolen, and a number of keys, among them one which fitted the door of the house which had been broken into. Later, Allport made a communication to the police, who thereupon went to the house where his (Allport's) wife was living, and there discovered some more of the stolen goods. Substantially all the stolen property was recovered. The appellants pleaded guilty at the trial. Golding was sentenced to five years' penal servitude. He was 23 years of age. In 1908 and 1910 he was bound over, after being convicted of stealing. Later in 1910 he was sentenced to six weeks' imprisonment for stealing an overcoat, and in 1911 to three months' imprisonment for loitering. In 1912 he was committed to a Borstal Institution for two years, but in 1915 he was again convicted of shopbreaking and larceny, and was sentenced to fifteen months' imprisonment. It is, however, submitted that the sentence of five years' penal servitude which was passed upon him in the present case was too

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severe in view of the fact that the Chairman was under a misapprehension as to the time which the appellant had passed in the Borstal Institution.

E. Bennett Calvert for the appellant Allport (under s. 10 of the Criminal Appeal Act), who was not present. This appellant is 51 years of age. The circumstances relating to him are very similar to those relating to Golding. The convictions against him are not so severe. He has only received four sentences in sixteen years, for keeping a bawdy-house, for dog-stealing, and on two occasions for false pretences, his longest sentence, four years ago, being one of six months' imprisonment. He has been carrying on an honest business, and it is submitted that the sentence of penal servitude in this case is much too severe.

St. John G. Micklethwait, for the Crown, was not called upon to argue.

The LORD CHIEF JUSTICE:

Golding.

The record of this appellant is a bad one. The fact that he was convicted of shopbreaking after his detention at a Borstal Institution shewed that that detention, so far as reforming him was concerned, was a failure. It has now been said on his behalf that he went down to Ebbw Vale to get work, and then again had recourse to crime of a serious character. He was found in possession of tools which shewed that he must have had in his mind the commission of the crime, and that he did not yield to a sudden impulse. That fact was, of course, taken into account by the Chairman. The sentence of five years' penal servitude is, however, in our opinion, too severe. It would never have been inflicted if there had not been some misapprehension on the part of the Chairman with regard to the period of the appellant's detention in the Borstal Institution, concerning which this Court has received a communication from the Chairman. On the other hand, it is impossible to say that a sentence of penal servitude is too severe for this case. Various attempts have been made to reform this young man, and as they have failed he must go to penal servitude for three years.

Sentence reduced.

Allport.

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Although this appellant appears to have been carrying on an honest business for some time, in view of the fact that he has been convicted on four previous occasions, this Court cannot say that the Chairman was wrong in sentencing him to penal servitude in a case of this character. This appeal must, therefore, be dismissed.

Appeal dismissed.

G. B.

ALFRED BARLOW.

18 *December.*

Hard labour may be lawfully imposed in a sentence for defamatory libel.

Appeal against sentence, passed by Darling J. at Leeds Assizes, for publishing a defamatory libel concerning one E. M. T. The accused pleaded guilty on the 23rd November, 1916, and was sentenced to twelve months' imprisonment with hard labour. Darling J. gave a certificate on a point of law.

Horace Wilson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appeal comes before this Court on the certificate of the learned judge at the trial, who wished the point to be argued whether a sentence of hard labour can be lawfully imposed on a conviction for publishing a defamatory libel, having regard to the provisions of s. 16 of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58). The title of this Act should be borne in mind; it is "an Act . . . . to amend the law with respect to the treatment and punishment of young offenders, and otherwise to improve the administration of Criminal Justice." It is submitted that the words "and otherwise" must be read as *ejusdem generis* with the preceding words, and that therefore s. 16 has gone beyond the plainly-declared objects of the Legislature. It is true that the provisions of a statute sometimes go further than the title of a statute, but not as a rule. Many Acts have been cut down by subsequent judicial interpretation: for instance, the provisions of the Lord's Day Observance Act.

With regard to the severity of sentence,—the letters were written

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ALFRED BARLOW.

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to two people only, and the contents were not likely to be published. The area of the libel was as limited as it possibly could be. The actual mischief caused was very small. A plea of justification could not have been raised; it was decided to rely rather on the general facts of the case. The letters written were no doubt abominable, but the accused refrained from denying that he wrote the letters, a fact which should be taken into consideration. The accused had an unblemished character and reputation, and had been in the same employment for a long period. It was not till the year 1914 that offences of this kind could be punished in this way, and the wording of s. 16 shews that hard labour need not be imposed.

BRAY J.: The two letters of 24th July and 29th July, 1916, contained gross and unfounded accusations of indecency. The opening of counsel for the prosecution at the trial shews the course of action adopted by the accused towards the girl. The learned judge at the trial, after the accused had pleaded guilty, imposed a sentence of twelve months' imprisonment with hard labour, but gave a certificate reserving for the consideration of the Court the question whether, since the passing of the Criminal Justice Administration Act, 1914, a sentence of hard labour could lawfully be imposed after a conviction for an offence of this character. The title of that Act is as follows: "An Act to diminish the number of cases committed to prison, to amend the law with respect to the treatment and punishment of young offenders, and otherwise to improve the administration of Criminal Justice." The title of the Act shews that it was intended to have more than one object, and that the Legislature meant to alter the existing law in certain cases. Then s. 16 says: "Where a person convicted by or before any court of an offence is sentenced to imprisonment without the option of a fine, the imprisonment may, in the discretion of the court, be either with or without hard labour, notwithstanding that the offence is an offence at common law or that the statute under which the sentence is passed does not authorise the imposition of hard labour or requires the imposition of hard labour." It is quite impossible, in our opinion, to give to these words any interpretation otherwise than in accordance with their clear meaning, and it is unnecessary to say anything further on this point. With regard to his sentence,

looking at all the facts of the case it is an extremely bad case, and the sentence of twelve months' imprisonment with hard labour was not excessive. The appeal is dismissed, but as leave to appeal was given the sentence will date from conviction.

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ALFRED BABLOW.

Bray J.

Appeal dismissed.

R. F. B.

MARK MAHOMMED NAGUIB.

On an indictment for bigamy the proof of a valid foreign marriage must be given by an expert in the law of the said foreign country.

Appeal against conviction on law and application for leave to appeal against sentence and for leave to call further evidence. The appellant was convicted, before Avory J., at the assizes held at Manchester on the 27th November, 1916, for bigamy, his wife being then alive, and was sentenced to eight months' imprisonment with hard labour. The appellant pleaded not guilty.

E. T. Nelson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant is an Egyptian, and the charge against him is that in November, 1914, he intermarried with Theresa Josephine Sullivan, his lawful wife, Annie Naguib, whom he married in 1903, being then alive. The defence raised at the trial was that the marriage of the appellant in 1903 was invalid, because at that time he already had a wife living in Egypt. At the time of his alleged marriage in Egypt to an Egyptian woman both parties were domiciled there.

[The LORD CHIEF JUSTICE: Was there any evidence at the trial of this Egyptian marriage?]

It was difficult to get evidence, and reliance had to be placed on the evidence given by the appellant. According to the evidence of the appellant's wife Annie Naguib, she lived with the appel-

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lant from 1903 to 1907, when the appellant left her and went to Egypt, promising to send his wife £4 a month while away. His wife then followed him to Egypt. While there she heard that he was already married, and on being taxed with this former marriage the appellant told his wife that he had been married in Egypt before coming to England, but that he had divorced his Egyptian wife. The appellant's wife then left Egypt and returned to England. The parties agreed to separate on the terms that the appellant should pay his wife £1 a week. The money due under this agreement fell into arrear, and in April, 1912, the appellant's wife took proceedings in the county court to recover the arrears. The county court judge dismissed the summons on the ground that the applicant was not the lawful wife of the appellant. In May, 1912, the appellant's wife obtained a separation order from the magistrates. In January, 1914, the appellant went through the form of a ceremony of marriage with Theresa Sullivan at the Turkish Consulate in Manchester, and shortly afterwards, on learning that the appellant had already been married in England, Theresa Sullivan left him and went to reside in Scotland.

[BRAY J.: Was any application made at the trial in Manchester for leave to obtain evidence of the Egyptian marriage?]

No. The evidence relied upon was that given by the appellant on oath.

[ATKIN J.: You have some evidence of repute about the marriage in Egypt, and a judgment of a Court of Record.]

I am prepared to admit that the alleged marriage in Egypt should be formally proved, but there are cases where an admission by the accused has been accepted.

[The LORD CHIEF JUSTICE: On an indictment it is essential that the validity of a foreign marriage should be proved.]

The prosecution must prove their case strictly. See Archbold,

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1294, and the case of *Newton* (or *Simmonite*), 1 Cox C. C. 30; 1 C. & K. 164; 2 M. & R. 503 (1843).

[ATKIN J.: The *onus* is on the accused to prove a valid marriage according to foreign law. He must prove, first, that there was a marriage, and secondly that it was valid according to foreign law. The last question is one of fact, and must be proved by expert evidence. See *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; 35 L. J. Q. B. 74; 6 B. & S. 100; 13 L. T. 602 (1805); Ex. Ch., where it is laid down: "A party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the Court to establish it in proof. Otherwise the Court, not being entitled to notice such law without judicial proof, must proceed according to the law of England."]

There was no possibility of obtaining expert evidence.

[The LORD CHIEF JUSTICE: But an application for the purpose would have been granted.]

On the question of sentence, the appellant appears to have thought that he was free to marry in 1914. The proceedings in the county court afforded some basis for this belief. The second marriage in England was contracted under an honest belief that he was free to marry, and I submit that the sentence of eight months' hard labour is too severe.

Travers-Humphreys (for *Roland Oliver*, serving with H.M. forces) for the Crown: On the question whether in the absence of evidence of foreign law, there is any presumption that English law applies, the case of *Griffin*, L. R. Ir. 497; 14 Cox C. C. 308 (1879); C. C. R. Ir., would appear to be the only authority. There four of six judges held that "in a case of bigamy a marriage contracted according to the rites of the Roman Catholic Church in a foreign state is presumed to be good without proof of the law of that foreign state relating to marriage."

The LORD CHIEF JUSTICE: The appellant was charged with bigamy by marrying, in 1914, one Theresa Josephine Sullivan, his wife Annie Wheeler (*or* Naguib) being then alive. He was

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convicted and sentenced to eight months' imprisonment with hard labour. He appeals against the conviction on the ground that before his first marriage in England he had contracted a marriage in Egypt which was valid. He says that his first marriage in England was no marriage, and that therefore in marrying again in 1914 he did not commit the crime of bigamy. At the trial the marriage of the appellant to Annie Wheeler in 1903 was proved according to English law. The defence to the charge of bigamy rested upon an alleged marriage in Egypt in 1898. Two points were brought out at the trial of the appellant. The first was that even if a marriage in Egypt was formally proved it was a polygamous marriage, and would not therefore be regarded as valid in this country. That point we need not deal with, because we are satisfied that the appeal turns upon the second point, namely, the absence of evidence relating to the marriage in Egypt. The appellant gave evidence on oath in regard to that matter. The prosecution proved that while married according to the laws of England, the appellant married a second time. The defence set up was that the first marriage in England was invalid, because of a prior marriage in Egypt. The following authorities shew that on an indictment for bigamy it is necessary to prove the legal validity of a foreign marriage by expert evidence: *Povey*, 22 L. J. M. C. 19; 6 Cox C. C. 83 (1852); C. C. R.; *Savage*, 13 Cox C. C. 178 (1876); *Lindsay*, 66 J. P. 505; 18 T. L. R. 761 (1902). We are clearly of opinion that it is necessary to adduce expert evidence in order to prove a foreign marriage, and the laws of evidence apply equally to the prosecution and the defence. In the present case there was no expert evidence relating to the alleged marriage in Egypt and nothing to shew that it was valid. The appeal therefore fails. With regard to the sentence, we think that in all the circumstances it cannot be regarded as excessive.

Appeal dismissed.

R. F. B.

BEFORE

MR. JUSTICE BRAY, MR. JUSTICE LOW, AND MR. JUSTICE McCARDIE.

JOSEPH SCHOFIELD.

1917
15 *January.*

It is a misdirection to treat as an admission of guilt an expression which is consistent with innocence.

This was an appeal against conviction on a point of law. Appellant was convicted on the 6th December, 1916, at the County of London Sessions, before the Deputy-Chairman, of feloniously receiving stolen property, and was sentenced to twenty-one months' imprisonment with hard labour.

St. John MacDonald for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant and a man named Prince were convicted of receiving tarpaulins, knowing them to have been stolen. I submit that there is no evidence that the appellant was ever in actual or constructive possession of the property. The only evidence against him is that when charged with the theft of the articles by the police he replied, "Just my luck." The Deputy-Chairman treated this as an admission, but it was no admission of guilt, and is sufficiently explained by the fact that he had only just been released from prison after a sentence of penal servitude. [He was stopped.]

Slade Butler for the Crown. Possession by one prisoner in this case would be possession by the other. The question is whether the two men were acting in concert; if so, they were in joint possession. *Rogers*, L. R. 1 C. C. R. 136; 37 L. J. M. C. 83; 6 Cox C. C. 38; 18 L. T. 414; 16 W. R. 733 (1868).

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JOSEPH SCHOFIELD.

L. v J.

Low J.: The appellant was convicted of ~~stealing~~ receiving two tarpaulins, knowing them to have been stolen, and a man named Prince, who was charged with him, was also convicted and does not appeal. The facts are that the appellant and Prince were seen in the morning to go out with a cart and horse belonging to Prince, which had been taken from stables also belonging to Prince. What they were doing for a considerable time is not known. Later the horse and cart, driven by Prince's son, arrived containing the tarpaulins. An hour and a half later the appellant and Prince arrived at the stables, and that is all the evidence to connect the appellant with the offence, except that when the police, who had been watching the premises most of the day, charged the appellant, he said "Just my luck." The Deputy-Chairman laid great emphasis on this expression and treated it as an admission. The Court is not satisfied that it should be treated as an admission, as it might be taken to be an expression of disappointment on the part of a person with the appellant's career at being charged with any offence. The Deputy-Chairman also said that probably the appellant and Prince were together when the tarpaulins were stolen. We are of opinion that probability is not enough to secure a conviction in a case like this, and in the absence of further evidence of what no doubt is a case of great suspicion, the Court has no alternative but to quash the conviction.

Conviction quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE COLERIDGE.

WILLIAM JAMES COLPUS, FREDERICK WILLIAM BOORMAN AND HORACE WHITE.

1917
22 *January.*

The Regulations which govern military tribunals do not bind the civil courts: evidence excluded from the former may be admissible in the latter.

The mere fact that a confession is made to a person or body in authority is not evidence of inducement by him or them: Thompson, (1893) 2 *Q. B.* 12, *and* Ibrahim *v.* R., (1914) *A. C.* 599, *followed.*

Severity of sentence. If an offence becomes frequent, sentence must be increased.

These were appeals against conviction on matters of law, and applications for leave to appeal against sentence. Appellants Colpus and Boorman were convicted on the 9th December, 1916, at the Lewes Assizes, before Horridge J., of conspiracy to defraud; White was convicted on the 11th December of obtaining money by false pretences and of conversion; all three appellants were sentenced on the 11th December to eighteen months' imprisonment with hard labour.

G. Cecil Whiteley for appellant Colpus, who was present. Colpus and Boorman were charged with a third man named Jeal with conspiracy to defraud the military authorities; Jeal was acquitted. It was alleged that Boorman, who was regimental quartermaster sergeant and also company quartermaster sergeant of No. 1 company of the 14th Queen's Royal West Surrey Regiment, obtained a cheque from Lieut. Saltmarsh for £33 8*s.* 4*d.*, which he said was the amount due to the Redhill and Reigate Laundry for the washing of his company, whereas the amount really due was £12 8*s.* 4*d.* The overt acts set out in the indictment were that Boorman obtained the cheque, that Jeal gave a

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receipt for the full amount, and that the proceeds were divided among the three prisoners. Colpus was the manager of the laundry, and he changed the cheque, properly applied the amount due to the laundry, and gave the change to Boorman. There was no evidence of any part of this sum having been paid to Colpus except statements made by the appellants at a military court of inquiry, consisting of Col. Beatson and two other officers "for the purpose of inquiring into and reporting upon the circumstances under which certain cheques were paid to the Redhill Steam Laundry Company in excess of accounts due for services rendered, and from whom the balance is recoverable." Rules of Procedure have been made under the Army Act, 1881, s. 70, and Rule No. 124 regulates the proceedings before a court of inquiry. Rule No. 124 L is as follows: "The proceedings of a court of inquiry, or any confession, statement, or answer to a question made or given at a court of inquiry shall not be admissible in evidence against an officer or soldier, nor shall any evidence respecting the proceedings of the court be given against any officer or soldier, except upon the trial of any officer or soldier under s. 29 of the Army Act, for wilfully giving false evidence before that court." I submit that by virtue of this regulation the evidence of Boorman was inadmissible at the trial, and that consequently his conviction cannot stand; if that is so, Colpus' conviction must be quashed also, as he cannot be convicted of conspiring with himself.

Even apart from the regulation the evidence was inadmissible, as it was a statement made to a person in authority, and the *onus* lay on the prosecution to prove that it was not induced by hope or fear. *Thompson*, [1893] 2 Q. B. 12; 62 L. J. M. C. 93; 5 R. 392; 69 L. T. 22; 41 W. R. 525; 17 Cox C. C. 641; 57 J. P. 312; C. C. R. The best way of proving that is to shew that a warning was given, but no warning was given here. Colpus had been asked to tell Jeal to come to see one of the officers who was investigating the matter, and to say that if he failed to come the police would be communicated with; this must have been present to his mind when he received a telegram from the commanding officer of the camp asking him to attend the court of inquiry. Moreover, he may well have thought that the invitation was under the Defence of the Realm Regulation 43, under which a civilian is bound to give information in certain cases.

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It has been held that everything said at a court of inquiry is absolutely privileged. *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 33 L. T. 196; 23 W. R. 931 (1875). It is true that most of the cases on the point deal with confessions, while here that statements made were admissions of a material fact, but the word "statement" is used in *Thompson* and also in *Ibrahim* v. *R.*, [1914] A. C. 599; 83 L. J. P. C. 185; 111 L. T. 20; 24 Cox C. C. 174; 30 T. L. R. 383, although both cases dealt with a confession.

[The LORD CHIEF JUSTICE: It may be that you do not require to use this principle if your point based on the regulation is a good one.]

Thesiger for appellants Boorman and White (under s. 10 of the Criminal Appeal Act), who were present. I rely on the same points. The facts in White's case were practically the same as in Boorman's, although he was convicted on a different indictment.

Mathew for the Crown. I confess that the point taken is a new one to me; it was not taken at the trial. The rules of procedure are made under ss. 69 and 70 of the Army Act, which refer to military courts of inquiry and courts martial. Rule 124 L can only mean that the evidence is not admissible against a soldier when he is tried by court martial; it cannot affect the admissibility of evidence in a civil court or alter the rules of evidence in ordinary courts of law. If it purports to do so the regulation is *ultra vires*. Colonel Beatson gave evidence that no threat or inducement was held out to the appellants, and that they could have refused to make any statement had they wished. *Brown*, 68 J. P. 15 (1903), where evidence of a statement made by a soldier to an officer was held admissible, is a stronger case than this.

[The LORD CHIEF JUSTICE: The point is of importance, and you may like to have an opportunity of considering it; we will adjourn the appeals until next week.]

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Sir Gordon Hewart, S.-G. (with him *Branson* and *T. Mathew*) for the Crown. Admissions and confessions fall into two main classes—(1) those made in judicial proceedings, which are ad-

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missible unless made in answer to questions improperly put or pressed after objection has been taken, or unless made inadmissible by statute: *Coote*, L. R. 4 P. C. 599, at p. 607; 9 Moore P. C. (N.S.) 463; 42 L. J. P. C. 45; 29 L. T. 111; 21 W.R. 553; 12 Cox C. C. 557 (1873); and (2) those made otherwise than in judicial proceedings, which are admissible if shewn to be made freely and voluntarily: *Thompson*.

S. 70 of the Army Act contemplates the making of rules of procedure for army tribunals only, and the rules of procedure only affect such tribunals. Admissions before a court of inquiry are made inadmissible at a court martial, but there is no provision making admissions at a court martial inadmissible at a civil trial. And it cannot be said that the statements were induced by hope or fear, as clear evidence was given by Colonel Beatson that the appellants could have refused to make any statement if they had so wished. "Statements on oath in civil proceedings or on inquiries before competent officers or tribunals are admissible in subsequent criminal proceedings against the witness if made voluntarily, *i.e.* with the power of refusing to answer the criminating question." *Russell on Crimes*, 7th ed., p. 2191, citing *Goldshede*, 1 C. & K. 657 (1844). In *Ibrahim* the statement held admissible was preceded by a question.

Whiteley: Rule of Procedure No. 124 L is not confined to proceedings before a court martial, and must at any rate apply to a court of summary jurisdiction, proceedings in which are dealt with in several sections of the Army Act. The court of inquiry is instituted under the King's Regulations (see Regulation 666), and not under the Army Act. S. 70 of the Army Act only gives power to make rules relating to them. The object of such a court is to elicit the truth, and for this reason the witness is encouraged to tell what he knows. An extraordinary position results if his statement can then be used against him in a civil court and not in a court martial, and he may in this way be trapped into making a statement.

[THE LORD CHIEF JUSTICE: The exception in the rule only applies to trial by court martial. If your argument is right the statement could not be given in evidence if the witness is tried civilly for perjury.]

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S. 29 of the Army Act is only inserted to give the military authorities power to try cases of perjury.

The rule is itself an inducement to the witness to make a statement; the inducement need not be a direct one, and therefore the statements made are inadmissible, as no warning was given. See *Manual of Military Law* (1914), Ch. VI., s. 75.

[RIDLEY J. referred to Stephen's Digest of Evidence, Art. 22.]

The admissions were made by the soldiers from fear of the consequences should they refuse to answer, and are therefore inadmissible on this ground. In *Booth and Jones*, 5 Cr. App. R. 177; 74 J. P. 475 (1910), there was considerable discussion whether the evidence was admissible although a warning had been given. In this case Colpus knew that the police might be communicated with if he and Jeal failed to give a satisfactory explanation; *Brown* was a decision on circuit by Wills J., who said he could find no authority in the text books; the prisoner was acquitted, so the question was not carried further.

The sentence on Colpus was excessive; he has borne an excellent character hitherto, and there was no suggestion that the frauds had been going on for long.

Thesiger: The Rule of Procedure did not materially alter the existing law; when a person appears before a court or person clothed with authority, the law presumes that his mind will be affected by hope or fear unless such hope or fear is removed. The usual way of removing it is by a caution; cautions were held necessary in courts of summary jurisdiction before the Indictable Offences Act, 1848. *Arnold*, 8 C. & P. 621 (1838). The statutory caution tells the prisoner that he need not make any statement unless he likes, that is to remove the fear; and that it may be given in evidence against him, that is to remove the hope that he will improve his position by making a statement. A caution was held proper in a coroner's inquest in *Wakley* v. *Cooke*, 4 Ex. 511; 19 L. J. Ex. 91 (1849), by Alderson B., and is in fact always given where there is any reason to suppose that the witness may be incriminated. The rule of procedure was made for the same reason, although it goes further and makes the evidence altogether inadmissible, even though a caution is

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given. It follows that, certainly where no caution is given, statements made at a court of inquiry are inadmissible in a civil court.

The sentences on Boorman and White were excessive; they both bore excellent characters, with long records of service in the army. White is in receipt of a pension, which he will lose if the sentence stands, and in a very similar case this matter was taken into consideration and the sentence reduced. *Daniels,* 11 Cr. App. R. 101 (1915). Both these appellants had served at the front and had suffered from shell shock; the companies of which they were quartermaster sergeants consisted of from 1,000 to 2,000 men, which resulted in their being greatly overworked; this, combined with their experiences in France, may have led them to commit acts of which they would never have been guilty in normal circumstances.

The LORD CHIEF JUSTICE: The appellants Boorman and Colpus were convicted on an indictment which charged them with another man named Jeal, who was acquitted, with conspiracy to defraud. They were each sentenced to eighteen months' imprisonment with hard labour. White was convicted on an indictment which charged him with obtaining a cheque by false pretences, and also with the fraudulent conversion of that cheque; he received the same sentence. All three ask the Court to quash the conviction on the ground that evidence was wrongly admitted of statements made by them at a military court of inquiry.

Boorman was the Regimental Quartermaster Sergeant and also Company Quartermaster Sergeant of No. 1 company; Colpus was manager of a laundry company, and a cheque for £33 was obtained by Boorman from Lieut. Saltmarsh for the washing of No. 1 company. The cheque was paid by the bank, and was endorsed by the laundry company with Colpus' name as secretary. It turned out that in fact only some £12 was due, and, although the whole money was received, only £12 was properly applied; of the rest, £1 was received by Jeal, £5 by Colpus, and £15 remained in the hands of Boorman.

The point raised is of some importance and has been elaborately argued before us. When the military authorities became suspicious a court of inquiry was ordered, and appointed, under the regulations made in pursuance of the Army Act, 1881, s. 70.

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By Regulation 124 A, "A court of inquiry is an assembly of officers directed to collect evidence, and, if so required, to report with regard to any matter which may be referred to them," and there are various other provisions regulating the procedure of a court of inquiry. The court sat, and during the investigation statements were made which affected Boorman in the sense that they might be held to reflect on his honesty. In pursuance of the regulations, Boorman was invited into the room, given an opportunity of cross-examining, and was invited to make a statement. Some questions were put to him, but, according to the evidence at the trial, in the main the statements were made by him and by Colpus without much questioning. At the trial these statements were put in evidence. White was another person under military command who had obtained a cheque under similar circumstances, and he also made a similar statement.

By Regulation 124 L, "The proceedings of a court of inquiry, or any confession, statement or answer to a question made or given at a court of inquiry, shall not be admissible in evidence against an officer or soldier, nor shall any evidence respecting the proceedings of the court be given against any officer or soldier, except upon the trial of any officer or soldier under section 29 of the Army Act, for wilfully giving false evidence before that Court." Reliance was placed on that regulation on behalf of all three appellants in support of this appeal, and it is submitted that the evidence is inadmissible on two grounds: first that, according to the proper interpretation of this regulation, statements at a court of inquiry could not be used in evidence in a civil court. It is clear that they could not be used at a court martial, and the question is whether the provision extends to civil courts. In our judgment this regulation only applies to military tribunals, and has no application to trials in civil courts. It is clear that the regulations were passed to regulate trials before military tribunals. The Army Act conferred jurisdiction on military tribunals in certain cases, but did not oust the jurisdiction of the civil courts. An exception is purported to be made to this regulation, that is, "Except upon the trial of any officer or soldier under section 29 of the Army Act, for wilfully giving false evidence before that Court." It would be a most extraordinary result if the depositions could be used in a prosecution for perjury before a court martial, but not at a trial for

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perjury in a civil court. If the argument of the appellants is correct, that must inevitably result. Without going further into the matter, it is quite clear to us that this regulation has no bearing on civil trials, but only affects military tribunals.

The second point is based upon the principle laid down in *Thompson*, which has been considered so recently in the Judicial Committee of the Privy Council in *Ibrahim* v. *R.* The portion of the judgment dealing with this branch of the case begins at page 609. That contains an elaborate review of the authorities by Lord Sumner, expressing the view of the Judicial Committee. The point cannot be better stated than it is by him in that case: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." Lord Sumner points out that the principle is certainly as old as Sir Matthew Hale's time, and has been discussed in many cases. We do not propose in this case to say more than that the principle laid down in *Thompson* as approved in *Ibrahim* v. *R.* is the principle to be applied here.

In this case it is said that the appellants were induced by hope or fear by a person in authority because, firstly, two of the appellants were under military law, and they had appeared before a court of inquiry composed of officers, and were bound by these regulations, and it is said they must be presumed to know the regulations, and consequently they ought to be treated as if they entered the court of inquiry in answer to that invitation with the promise held out that the evidence would not be used against them, or in fear of what might happen if they did not make a statement or answer questions, and that therefore they made these statements in the circumstances described in *Ibrahim* v. *R.* The difficulty in the way of that argument is that it has no foundation in fact. When it is examined it appears that the regulation was never mentioned to the judge. It was discovered only just as the case was coming into the list on the last occasion, and, if we regard it merely as a question of fact, it is abundantly clear that not one of these men ever had the regulation in mind, and therefore could not have been induced

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by any statement in the regulation. It is a purely artificial argument founded on the principle that a man is presumed to know the law. Dealing here with the facts, if the point had been brought before the judge, it would have been a matter of discretion for him whether such an inducement was made as would shut out the evidence or not.

A further argument in this case is based on the proposition laid down in *Thompson*, because it is said that these soldiers were brought before a tribunal consisting of men in authority, and may be said to have been induced by fear to make the statements. If that in itself is an inducement it is difficult to see how any statement made to a person in authority could be admissible. Again dealing with the facts, were any of the appellants induced to make the statement by hope or fear? The only evidence is that of Colonel Beatson, who said that, though subject to military authority, the two soldier appellants were not bound to make statements. In the absence of any other evidence we cannot come to the conclusion that the statements were induced by hope or fear, but are of opinion that they were made freely and voluntarily. For these reasons the appeals against conviction fail in each case

As to the sentence, it is true that the Court, at the beginning of 1915, did take a more lenient view in a somewhat similar case, but we are now at the beginning of 1917, and offences of this character have not ceased. We think the fact that these men had such good characters led to their being trusted, and that they used their characters to abuse their trust. The appeals against sentence, therefore, are also dismissed.

Appeals dismissed.

Solicitors for Colpus—*Triggs, Turner and Hart*, Guildford.

A. L. B. T.

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WALTER JAMES FRAMPTON.

A summing up, in effect recommending a verdict of Guilty, which does not adequately put the defendant's case, will be quashed.

This was an appeal against conviction, by leave of McCardie J. Appellant was convicted on the 3rd January, 1917, at the Dorset Sessions, of obtaining money by false pretences, and was sentenced to twelve months' imprisonment with hard labour.

H. Hickman for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The case for the prosecution was that the appellant called on a lady and offered some railway sleepers for firewood; he was given £1, and said he would send the firewood and a receipt on the following day. The appellant denied that he was the man, and called a lad Dunford to give evidence in support of an *alibi;* this witness contradicted himself on several points. My submission is that the summing up of the Chairman was unsatisfactory. He said, "Mrs. Wright does not choose to identify the man." She was unable to do so, and this expression was inaccurate and improper. He said, "The prisoner *of course* gives you a suggestion that he was going round with a commercial traveller, and it is attempted to be bolstered up by the boy Dunford." "Dunford is evidently lying, and I warn you not to accept his evidence. His evidence is not worth twopence. He is a liar. He has committed perjury in that box, and he is liable to penal servitude for what he has done." "I think that the identification in this case is very complete, and that the attempt to corroborate the prisoner's story has failed." "It is open to you to find a verdict of not guilty if you can bring it to your consciences to do so." These questions were for the jury, and were not properly left to them. Only one witness, a servant named Tott, identified the prisoner, and she merely opened the front door and went to fetch her mistress. The appellant and his wife gave evidence in support of the *alibi*. The wife's evidence was not mentioned in the summing up at all.

Randolph Glen for the Crown. *Martin*, 1 Cr. App. R. 52 (1908), shews the principle which is to be applied. That was a very similar case to the present one.

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The LORD CHIEF JUSTICE: We think that the summing up of the Chairman goes too far in its comments, and cannot really be said to have put the prisoner's case to the jury. We do not say that his view is not justified, but a serious defence had been put forward, and the whole question was whether the jury would convict the appellant on the evidence of the girl Tett. It was a question of identity, and the appellant called evidence to prove an *alibi*. We cannot allow a summing up which puts the case so strongly against the prisoner to stand, so the conviction must be quashed.

Conviction quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE BRAY.

1917
5 & 6 *February.*

JOHN NOAKES.

The state of health of an absent witness whose depositions it is proposed to read, may be proved by any credible witness on whom the Court can rely on the point: Stephenson, *L. & C.* 165 (1862), *followed.*

Appeal against conviction.

The appellant, John Noakes, was convicted on January 4, 1917, before the Deputy-Chairman, at the West Kent Sessions, of an offence under s. 7 of the Prevention of Crimes Act, 1871, and was sentenced to twelve months' hard labour.

Roome for the appellant (under s. 10 of the Criminal Appeal Act, 1907). On October 16, 1916, the appellant (who had been convicted on April 28, 1916, when a previous conviction of a crime was proved against him, and had been sentenced to twelve months' imprisonment with hard labour), was found by Police-Constable Eades, who was then off duty, in his (the constable's) kitchen, turning out the drawers. The appellant made an excuse, and when the constable laid hands on him began to struggle. He was eventually taken to the police station. On a later date, Detective-Constable Bates saw the appellant at the police court, and told him that he was going to be charged with an offence under s. 7 of the Prevention of Crimes Act, 1871. The appellant replied, "No more than I expect."

When before the magistrate he elected to be tried by a jury, and was therefore committed for trial. At the trial Police-Constable Baker gave evidence that he had been present at the petty sessions when the appellant was charged. Police-Constable

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Eades and Detective Bates then gave evidence, which was read over to them and signed by them. The appellant was present, and had an opportunity of asking the witnesses questions. He (the witness) had since seen the two witnesses in the presence of Dr. Bray, and neither of them was well enough to travel so as to be present. He had the certificates of the doctors.

The Chairman accepted this evidence, and allowed the depositions of Eades and Bates in the police court to be read. It is submitted that these depositions were wrongly admitted as evidence at the trial. The case of *Stephenson*, L. & C. 165; 31 L. J. M. C. 147 (1862), makes it clear that the matter is one for the discretion of the Court, but that discretion must be exercised in conformity with decisions of the High Court, which shew that before depositions can be admitted as evidence, medical testimony (or evidence of equal value) should be given of the inability to attend of those witnesses whose depositions it is proposed to read. He referred to *Welton*, 9 Cox C. C. 296 (1862), and *Butcher*, 64 J. P. 808 (1900).

C. M. Pitman, for the Crown, was not called upon to argue.

[The case was adjourned that further evidence might be called.]

The further evidence having been called, judgment was given as follows:—

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RIDLEY J.: The question for the consideration of the Court in this case is whether the evidence given by the constable Baker, about the ill-health of Police-Constable Eades and Detective Bates was sufficient proof of the inability of these witnesses to attend to give evidence at the trial of the appellant. The Chairman considered that it was sufficient evidence, and allowed the depositions of the witnesses to be read. It was contended by counsel for the appellant that it was not sufficient evidence, because medical evidence of the condition of the witnesses should have been given. This Court does not think that that is a correct statement of the law. S. 17 of the Indictable Offences Act, 1848, enacts that before a deposition can be read as evidence it must be proved by the oath or affirmation of any credible witness that the person whose deposition is proposed to be read

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JOHN NOAKES.

Ridley J.

is dead, or so ill as not to be able to travel. There is no provision in the section that medical evidence shall be given. On the other hand, the evidence, whatever it may be, must be such as the Court can rely upon. It must not be merely the statement of a person who has been informed of the illness which prevents the witness from travelling. The case of *Welton* appears to turn upon the fact that the constable who was called to prove the illness of the absent witness could not of his own knowledge speak to such facts as would enable the Court to rely upon his testimony. The case is not to be taken as a decision that medical evidence of the condition of a witness must be called before the deposition of that witness can be admitted as evidence. If it were so, it would be directly in conflict with the decision of the Court in *Stephenson*. There Erle C.J. said: "The evidence in this case was that of the brother of the woman whose deposition had been read that she was daily expecting her confinement, and was poorly otherwise, and therefore too ill to travel from her place of residence to the place of trial . . . about twenty-five miles. . . . We are all of opinion that the question whether the illness proved is or is not within the statute is a question for . . . the presiding judge; and that if to his mind, exercising his discretion upon the facts proved, the evidence of illness is sufficient, this Court ought not to interfere with his decision": conviction affirmed. In view of that case, it seems quite impossible to say that the Chairman here exercised his discretion wrongly in allowing the depositions to be read. Baker did not give evidence of what he had heard about the condition of Eades and Bates. He had actually seen them in the presence of the doctor who was attending them. On the facts of the case it is beyond dispute that the appellant was properly convicted, and this appeal must, therefore, be dismissed.

Appeal dismissed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BAILHACHE, AND MR. JUSTICE ATKIN.

JAMES WALDEN.

1917
13 *February.*

Severity of sentence.
In certain cases the first term of penal servitude is properly five years.

Appeal against sentence.

The appellant, James Walden, was convicted on January 9, 1917, before the Recorder, at the Grimsby Borough Sessions, of larceny, and was sentenced to five years' penal servitude.

The appellant in person.

The Crown was not represented.

The LORD CHIEF JUSTICE: The appellant, James Walden, pleaded guilty to stealing money and property from the Grimsby Gas Company, and was sentenced to five years' penal servitude. He now applies to this Court for a reduction of that sentence. Undoubtedly the sentence is a very severe one in view of the offence for which it was imposed, but his record is a bad one. He is now only 23, but between 1904 and 1911 he was convicted on nine occasions for petty theft, receiving on one occasion twelve months' imprisonment with hard labour. In 1912 and 1914 he was convicted of housebreaking and larceny, receiving, on the first occasion, a sentence of two years' detention in a Borstal Institution, and, on the second, one of six months' imprisonment with hard labour. In 1915 he was convicted of larceny, and received two concurrent sentences of three months with hard labour. With the consent of the appellant, four outstanding charges of burglary or larceny were also taken into account when the sen-

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JAMES WALDEN.

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tence against which he appeals was determined. He enlisted in the army nearly two years ago, but his record there is very bad. During the time of his service he has only done three weeks' training, and has only been on parade six times, the greater part of his time having been spent in the cells for military offences. In the recent case of *Myers*, 11 Cr. App. R. 115 (1915), this Court held that the sentence which had been passed on the appellant there of five years' penal servitude was too severe, as it was the first sentence of penal servitude which had been inflicted on him. But that decision is not a rule which binds us in every case, and in view of the bad record of this appellant the Court feels that it is impossible to interfere with the sentence.

Appeal dismissed.

G. B.

FREDERICK MARSHALL.

Severity of sentence.
In imposing sentence the judge must accept the jury's finding.

Appeal against sentence.

The appellant, Frederick Marshall, was convicted on January 9, 1917, before the Deputy-Recorder, at the Leeds City Sessions, of common assault, and was sentenced to six months' imprisonment with hard labour. He was not present.

Charles Mellor for the appellant: The appellant was charged on an indictment containing three counts, with (a) maliciously wounding his wife, (b) causing her grievous bodily harm, and (c) a common assault upon her. On the day upon which the offence was alleged to take place the appellant had a quarrel with his wife at tea-time. Subsequently, he went out, and as he did not come back, his wife went out to look for him. She visited several public-houses and returned home without the appellant somewhat the worse for drink. A short time afterwards the appellant came home, and there was another quarrel between him and his wife, because he wanted his supper and his wife declined to get

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FREDERICK MARSHALL.

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it. He then struck her. There was some conflict of evidence whether before the blow the woman used abusive language to the appellant and spat at him. When struck, the woman fell, and was found almost immediately after by her daughter lying on the ground bleeding profusely from her private parts. She was taken to the doctor, and eventually recovered. The appellant and his wife had lived together for twenty-two years, and upon the whole the married life was happy. The doctor who attended the woman said in evidence that in his view the injuries were due to a kick. It also appeared in evidence, however, that there was a zinc bucket which was overturned in the struggle, and it was suggested that the woman fell upon it and thus suffered the injuries. The jury found the appellant guilty on the charge of having committed a common assault under great provocation. In these circumstances it is submitted that the sentence passed of six months' imprisonment with hard labour upon the appellant is too severe, and should be reduced.

The Crown was not represented.

BAILHACHE J.: It is tolerably clear from what fell from the Deputy-Recorder when passing sentence on the appellant that he was inclined to the view that the appellant had kicked his wife and so injured her. The jury, however, by their verdict, negative that view. One of the most difficult duties of a judge is to adjust his sentence to the verdict of the jury when he does not agree with it. In this case we think that the Deputy-Recorder kept his own view of the case too much in mind, and that he did not give sufficient effect to the verdict of the jury. We think that the sentence should be reduced to one of six weeks' imprisonment with hard labour.

Sentence reduced.

Solicitor for the Appellant—W. *Wright*, Leeds.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BAILHACHE, AND MR. JUSTICE LOW.

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ERNEST ALBERT PEERS AND VINCENT BROWN.

If a "place," &c. is kept for the purpose of enabling the owner to gain money on "any event or contingency" within s. 1 *of* 16 & 17 *Vict. c.* 119, *the Betting Act*, 1853, *the fact that this is brought about through a "game" of skill does not prevent its being an offence:* Peers *v.* Caldwell [below] *followed.*

The section is not limited to cases where in the event of success payment is to be made by one who took no part in the game. A bet exists if either party takes part in bringing about the deciding event.

The appellants, Ernest Albert Peers and Vincent Brown, were convicted on January 3rd, 1917, before the Recorder, at the Liverpool General Quarter Sessions, of offences under the Gaming Houses Act, 1854, and the Betting Act, 1853, and were each fined ten guineas and ordered to pay the costs of the prosecution. They now appealed against their convictions on certificates. They were not in custody.

Greer, K.C. (*Lindon Riley* and *Harold Smith* with him), for the appellants. The appellants were convicted on an indictment which charged them, on the first count, with using a shop for the purpose of unlawful gaming being carried on therein contrary to provisions of s. 4 of the Gaming Houses Act, 1854; on the second count, with using the same shop for the purpose of betting contrary to the provisions of s. 1 of the Betting Act, 1853; and on the third count, with keeping a common gaming house. The appellant Peers was the owner of a machine with which the alleged unlawful game was played, and which was placed in the sweet-shop of the appellant Brown, there being

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an agreement between Peers and Brown in regard to division of the profits. The machine consisted of a case in which was the figure of a clown fixed on a movable base, with his hat inverted in his hand. When a penny was placed in the slot of the machine a ball was released from the top of the machine which rolled down, its course being rendered uncertain by the presence of groups and rows of pins. The player attempted, by manipulating a handle attached to the base on which the clown was fixed, to move the figure so that the ball was caught in the inverted hat. If the player was successful he obtained a diso entitling him to two-pennyworth of sweets. It is submitted that this was clearly a game of skill, or at least one into which a substantial degree of skill entered. The conviction under the Gaming Houses Act, 1854, was, therefore, clearly wrong, since to justify such a conviction the game played must be an unlawful game, that is, a game of mere chance or containing so small a degree of skill as to be negligible. In regard to the charge under the Betting Act, 1853, the prosecution alleged that the appellants had received the pennies of the players as or for the consideration for an "assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter" a certain "valuable thing," namely, a check entitling the holder to obtain goods to the value of 2*d.* on a certain "event or contingency." The suggestion was that the appellants betted against the player's success. But it is submitted that that view is untenable. What occurred was analogous to paying an entrance fee for the privilege of entering a competition in which a prize is given. Moreover, the essence of a bet is the staking of money to obtain money on a contingency. Where the consideration is the opportunity of exercising skill for the purpose of earning a prize the transaction is not a bet. In regard to both parts of the case the Recorder misdirected the jury. He failed to direct them that for a game to be an unlawful game it must be a game of chance, with no substantial element of skill, and he also told the jury that, if they thought that the real object of the players was to win the prize and not to exercise their skill, they would be justified in concluding that an offence under the Betting Act, 1853, had been committed.

He referred to *Jenks* v. *Turpin*, 13 Q. B. D. 505; 53 L. J. M. C. 161; 50 L. T. 808; 49 J. P. 20 (1884); *Reg.* v. *Hobbs*. 1898, 2 Q. B. 647; 67 L. J. Q. B. 928; 79 L. T. 160;

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62 J. P. 551; *Peers* v. *Caldwell*, 1916 1 K. B. 371; 85 L. J. K. B. 754; 114 L. T. 609; 80 J. P. 181; K. B. D.; and *Mackintosh* v. *Granata*, 53 Scot. L. R. 766 (1916).

Greaves Lord (*Rigby Swift, K.C.*, with him) for the respondents: In regard to the conviction under the Betting Act, 1853, it is clear that the question for the jury was what the transaction between the appellants and the players amounted to. If the transaction was that the appellants by the notice on the machine asked persons who entered the shop to play a game, in effect, staking 2*d.* that the player would not succeed, it was clearly a betting transaction, and the conviction of the appellants for using the shop for betting was right, since the direction of the Recorder on this point was without fault. He rightly asked the jury to address themselves to the question of what was the intention of the players when they went to the machine, as it bore directly on the nature of the transaction. The only criticism to which the direction was open was that it was rather too favourable to the defence. It is submitted that the appellants really backed their chance against the player, and that the conviction on this point was good.

Greer, K.C., replied.

The LORD CHIEF JUSTICE: The argument in this case has mainly turned upon s. 1 of the Betting Act, 1853, and if the conviction of the appellants under that section can be supported the questions raised on the other counts need not be considered. The Betting Act, 1853, 16 & 17 Vict. c. 119, is intituled "An Act for the Suppression of Betting Houses." The preamble has been read in the course of the argument. S. 1 provides: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for

any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

It is said here that the receipt by the appellants of the players' pennies was a receiving of money as or for the consideration for a promise to give a valuable thing on the event or contingency of the player catching the ball in the clown's hat, and thus winning a disc. For the appellants it was said that the players came to the machine to exercise their skill, and for no other purpose, and that no betting transactions took place between them and the appellants.

I do not think that the use of the word "betting" enables us to advance in the argument. It might be said, in popular language, that, if a person put a penny into the machine with the object of winning 2*d*., the proprietor of the machine was betting against the success of that player. But we do not think that that really helps us to the solution of this case. The true test is one of fact, and it is whether or not Brown's shop was kept for the purpose of the proprietor receiving money "as or for the consideration for a promise to give a valuable thing on a certain event or contingency." It cannot be gainsaid that this case might be brought within the literal language of the section, but it is contended that, when the object of the statute is regarded, the section must be given a different meaning from that which is the literal meaning. It was argued that for a case to fall within the section, the payment in the event of success must be made by a person who takes no part in the game. The Court is unable to accept that view. A bet exists if both the persons interested take part or one of them takes part in attempting to bring about the event which is to decide it. We cannot see how it is possible to say that this section refers only to an event or contingency in an attempt to bring about which the bettor takes no part. Neither can we perceive how the exercise of skill by one or both of the

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players can be said to affect the question at issue. A person who exercises his skill to win a stake is equally within the Act as if he were dependent upon the skill of another person or upon mere chance.

Some difficulty, undoubtedly, is created by the language used by the judges in some of the cases upon this subject, but when they are examined their meaning becomes clear. In *Peers* v. *Caldwell,* where the same machine was in question, Ridley J. pointed out, quite accurately, that this game was in the nature of a wager, and said: "The fact of there being a possibility of exhibiting some degree of skill in playing with this machine does not, in my opinion, affect the question of the liability of the appellants." This Court agrees with that conclusion. It is true that Ridley J. went on to say that "to my mind the boys were not exercising skill; they were thinking only of the sweets." But that was not an expression of law. The judge was only dealing with certain arguments which had been submitted to the Court. The test is what is the intention of the person keeping the house, and if it can be established that he provided the machine merely to afford to the players opportunities of exercising their skill there is no offence under the Act. The Court of Justiciary, in *Mackintosh* v. *Granata,* took a different view, and approved the dissenting judgment of Lush J. in *Peers* v. *Caldwell,* in which the judge expressed the opinion that if the game was one of skill no conviction was possible either under the Gaming Act or under the Betting Act, 1853. This Court is quite unable to accept that view. Whether or not a game is one of skill is immaterial in the case of an offence under the Betting Act, 1853.

The conclusion to which we have come is that on the whole no fault can be found with the summing up of the Recorder, although there is material for minor criticism. These convictions must, therefore, stand.

Appeals dismissed.

Solicitors for Appellants—*Edwin Berry & Co.*, Liverpool.

Solicitor for Respondents—*E. R. Pickmere,* Town Clerk, Liverpool.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE HORRIDGE.

THOMAS CLINTON.

1917
5 *March.*

On an indictment for murder if defendant's counsel does not suggest a possible verdict of manslaughter but only an acquittal on the ground of accident, the judge is not bound to suggest that verdict: Hopper, 11 *Cr. App. R.* 136 (1915), *distinguished.*

This was an application for leave to appeal against conviction. Appellant was convicted on the 15th February, 1917, at the Manchester Assizes, before Shearman J., of murder, and was sentenced to death.

Gilbert Gordon for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant is a private in the Welsh Fusiliers, and he was convicted of the murder of the Company Sergeant-Major of the company to which he belonged. There was no suggestion of any ill-will between the appellant and the deceased except that on the 4th November, 1916, the deceased ordered him to be arrested for being drunk and noisy, for which he was subsequently confined to barracks for a few days. On the 13th January the appellant was one of twelve men who were on guard duty; on mounting guard, twenty rounds of ammunition were served out to each man, five of which were put in the magazine of the rifles. Evidence was given that if the "cut-off" is closed it prevents a cartridge from getting into the firing chamber until the bolt is opened and closed again. A lieutenant inspected the guard, and the appellant complained, as he was entitled to do, that an insufficient number of dinners had been served out. The appellant then returned to the guard room. Between 3 and 3.30 p.m. he was seen to leave the guard room, carrying a rifle with the bayonet fixed, and go to the company orderly room. He entered the room holding the rifle at the

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"on guard" position, which is no doubt a position of assault as well as of defence. He walked to within three feet of a table at which the deceased was sitting, and without moving his rifle, said, "Now, Sergeant-Major"; as soon as he said it the rifle went off, striking the deceased at the bottom of the throat, and inflicting a wound from which he died shortly afterwards. The appellant dropped his rifle, walked out of the room, and then put his hands on his face and sank to the ground.

He was arrested and handed over to the police, and while in custody he made the following three statements: "Will you answer me one question; did the bullet strike him? That is all I want to know. He has been a scamp to all the company. I am sorry to say he is a bad one." "Did the bullet go near the sergeant-major? It is a pity it did not kill him. He is a bastard." "He is a swine. It is a wonder he has not been laid out before. I was as near to him as I am to you. I let go at him. He deserves all he got."

My ground of appeal is that on the facts deposed to at the trial the judge should have directed the jury that it was open to them to return a verdict of manslaughter, whereas he told them they must either find the accused guilty of murder or acquit him. If a man takes a rifle, which on the evidence he had no right to have at the moment, and which contains cartridges in the magazine and possibly in the firing chamber, and if he holds that rifle in a threatening position in front of another person, without intending to shoot him, he is guilty of manslaughter should the rifle be discharged with fatal results: it would be a case of criminal negligence. It is true that I argued that there had been no threatening, but it would have been impossible for me to put forward alternative defences; even if I did not raise the defence of manslaughter it was the duty of the judge to give the jury an opportunity of finding that verdict. *Hopper*, 1915, 2 K. B. 431; 84 L. J. K. B. 1371; 113 L. T. 381; 79 J. P. 335; 59 S. J. 478; 31 T. L. R. 360; 11 Cr. App. R. 136. The appellant was prejudiced because the jury may not have wished him to go unpunished in the circumstances, but might have convicted him of the lesser offence had the alternative been open to them.

A. H. Maxwell and *Lindon Riley*, for the Crown, were not called upon.

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The LORD CHIEF JUSTICE: The appellant was convicted of the wilful murder of Sergeant-Major Lynch. He applies for leave to appeal against his conviction, and the application has been treated as the appeal. The ground of the appeal is that the judge directed the jury that the only alternatives which they could come to on the facts were either that the appellant was guilty of murder or that that matter was an accident. It is complained that he ought to have left it open to them to find a verdict of manslaughter based on the careless handling of the gun by the appellant, and the threatening attitude in which he entered the room. The sole question we have to consider is whether the judge's direction was right.

In November, 1916, the appellant was confined to barracks for seven days on a charge of drunkenness, and the order for his arrest was in the first instance given by the deceased. So far as the evidence shews that is the only occasion on which the appellant and the deceased were in conflict, if they were in conflict then. On the 13th January the appellant complained that there were seven dinners short. It turned out that the complaint was justified, and the dinners were subsequently provided. The deceased had nothing to do with that complaint. The appellant was one of the guard on the 13th January, but was not actually on sentry duty at the material time. He came a little after three o'clock to the room where the deceased was sitting and could be seen by anyone passing the window. Another non-commissioned officer and a private were there. The appellant opened the door, carrying at the trail his rifle with the bayonet fixed, and, as it turned out, with a cartridge in the firing chamber. There should have been no cartridge in the firing chamber, even if he had had a right to be carrying the rifle. The rifle ought to have been left on the rack until the appellant went on sentry duty at 7 p.m. He put the rifle at the "on guard" position, which is one of assault or of parrying with the bayonet, and also a position in which, if fired, it could hit a person. The rifle was fired and struck the sergeant-major in the throat. The appellant came out, dropped his rifle, covered his face with both hands and dropped on one knee. In a few minutes the sergeant-major died as a result of the wound caused by the rifle.

The question is whether in these circumstances the judge ought to have directed the jury that it was possible for them to return

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a verdict of manslaughter. The case for the Crown was that the appellant did the act deliberately, having taken the rifle and gone into the room for the purpose of shooting the sergeant-major, and they relied on three statements made by the appellant to the police. The first was, "Did the bullet strike him? That is all I want to know. He has been a scamp to all the company. I am sorry to say he is a bad one." The second, "Did the bullet go near the sergeant-major? It is a pity it did not kill him. He is a bastard;" and the third, "He is a swine. It is a wonder he has not been laid out before. I was as near to him as I am to you. I let go at him. He deserves all he got." The case for the defence was that it was an accident, and that the appellant never attempted to threaten the deceased. From beginning to end it was conducted on the lines that the only question was whether the killing was deliberately done or accidentally, and that unless the jury came to the conclusion that the act was done deliberately they were bound to acquit. In these circumstances we cannot think the judge was wrong in not leaving to the jury that they might find manslaughter. On the facts, and having regard to the conduct of the case, the course adopted was the most favourable to the appellant. We are not saying anything in conflict with the decision in *R.* v. *Hopper*. There the judge left the case in the same way, that the jury must find murder or acquit. The defence had intimated that it might be a case of manslaughter, and we came to the conclusion that there was evidence of provocation which, if the jury believed it, might have reduced the crime to manslaughter, and so it was necessary to leave that question to the jury. This case is a different one for the reasons we have given. The defence never raised the question, but, what is more important, on the facts it cannot be said that the appellant has any grievance; the case could not have been left to the jury more favourably to him than it was Unless the jury accepted the evidence of the statements made by the appellant they could not find murder. We must take it, therefore, that they did accept the evidence that the appellant made those statements. It follows that the appeal must be dismissed.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE HORRIDGE.

LEO GEORGE O'DONNELL.

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When a matter is distinctly relevant to the defence set up, a question about it in cross-examination of defendant, even though the answer may incriminate him, is "admissible" within s. 1 (*f*) (*ii*) *of the Criminal Evidence Act,* 1898.

Provided that the judge in summing up clearly leaves the issues of fact to the jury, he is entitled to express his opinion on the facts of the case.

Application for leave to appeal against conviction.

The applicant, Leo George O'Donnell, was convicted on February 10th, 1917, before Darling J., at the Winchester Assizes, of murder, and was condemned to death. His application for leave to appeal was, according to the practice of the Court in such cases, treated as a final appeal.

Du Parcq (under s. 10 of the Criminal Appeal Act, 1907) for the applicant (who was not present): The applicant was convicted of having murdered Lieut. Watterton at Aldershot on January 1st, 1917. At the trial he went into the witness-box to give evidence on his own behalf. During the course of cross-examination, counsel for the prosecution put a number of questions to him which were directed to shew that, when attesting on his enlistment into the army, he had given incorrect particulars. By s. 99 of the Army Act, it is a criminal offence knowingly to make a false answer to any question contained in an attestation paper, and therefore the questions put by counsel for the prosecution put the applicant in the dilemma of making untrue statements or of admitting the commission of a criminal offence. They only went to the credit of the applicant, and therefore were

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illegal under s. 1 of the Criminal Evidence Act, 1898. Moreover, in summing up, the judge expressed his views on the case so strongly to the jury, in a manner adverse to the applicant, that the latter's case was very seriously prejudiced. It is submitted that this expression of views was so strong as to amount to misdirection. For both these reasons, the conviction should be quashed.

Clavell-Salter, K.C. (*Rayner Goddard* with him) for the Crown: The questions put to the applicant in cross-examination were relevant to the issues raised in the case, and therefore, although they went to the applicant's credit, they were admissible and cannot vitiate the conviction. [He was stopped.]

The LORD CHIEF JUSTICE: Two points have been taken on behalf of the applicant. First, it is argued that at the trial counsel for the prosecution asked the applicant questions in cross-examination which were precluded by s. 1 of the Criminal Evidence Act, 1898, inasmuch as they were questions which were not relevant to the issue, and were directed only to credit. Secondly, it is said that the judge indicated so strongly his view of the facts of the case that it could not be said that he left those facts to the determination of the jury. In the opinion of the Court both these points fail. As regards the first, we are satisfied that the questions complained of were relevant, and therefore admissible, although they affected the credit of the applicant. The case for the prosecution was that the applicant formed an intention to murder the deceased man some time before the commission of the offence: that he intended afterwards to disappear and that he asked for fourteen days' leave, which was of somewhat unusual length, in order to give himself an opportunity of getting well away before any inquiry about him could be made. Evidence was given that when the applicant asked for leave he said that he wished to get married, that he was a Roman Catholic, and, therefore, could not obtain a special licence and have the marriage ceremony performed within a short time. The applicant was asked in cross-examination whether he had not stated his religion to be Wesleyan for the purpose of the particulars on his attestation paper. In these circumstances the Court thinks that the questions were clearly relevant, since they were directed to shew that the

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reason given by the applicant for wanting long leave was untrue. When he was taxed with the entry on the attestation paper, he said that it was not his paper at all.

In regard to the second point, it is sufficient to say, as this Court has said on many occasions, that a judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, or that it differs from accounts which he has given of the same matter on other occasions. No doubt the judge here did express himself strongly on the case, but he left the issues of fact to the jury for their decision, and therefore this point also fails. The application must be refused.

Application refused.

G. B.

ALEXEI LETENOCK.

19 *March.*

Murder—Provocation may be less, in order to reduce murder to manslaughter, in the case of a drunken than of a sober man.

Application for leave to appeal against conviction.

The appellant was convicted on February 26th, 1917, before Rowlatt J., at the Guildford Assizes, of murder, and was sentenced to death. His application for leave to appeal was, according to the practice of the Court in such cases, treated as a final appeal.

F. O. Robinson (under s. 10 of the Criminal Appeal Act, 1907) for the appellant (who was present): The appellant, a Russian, who had enlisted in Canada in the Canadian Expedi-

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tionary Force, and had come over with that force to this country, was convicted of murdering a corporal in his regiment, named William Palmer, at Witley Camp, Surrey, on December 6th, 1916. He occupied a hut at Witley with a number of other men, under the command of the deceased man, Corporal Palmer. According to the evidence of two of the witnesses for the prosecution, on the evening of the crime the appellant came to the hut, drunk, shouting and singing. The witnesses were in bed at the time. The corporal told appellant to be quiet. The next thing they remembered—they had meanwhile been asleep or dozing—was hearing the corporal call for help, and he was found lying in his bed stabbed in various places. For the defence it was said that, earlier in the day, the applicant had been struck by a sergeant in the regiment; that, suffering from a feeling of injury, he went later to a public-house, where he became intoxicated; and that on his return to the hut an altercation took place between him and the deceased man, in the course of which the latter adopted so violent and provocative an attitude towards the applicant that, in view of his drunken condition, which impaired his judgment, and of the treatment he had received from the sergeant earlier in the day, he misapprehended the intention of the corporal, and anticipated some attack. The wounds which he inflicted upon the corporal were really the result of a *bonâ fide* misapprehension of what the corporal was about to do. In directing the jury on this part of the case, Rowlatt J. said that unless the applicant was so drunk at the time of the commission of the offence as to be absolutely incapable of knowing anything of what he was doing, his drunkenness could afford no answer to the prosecution. That direction might be right in a case where there was no provocation, and the sole matter before the jury was the drunkenness of the accused; but here, according to the applicant's story, there was provocation. Where there is evidence of provocation the drunkenness of the accused can be taken into account in considering what effect the provocation had on his mind. *Marshall*, 1 Lewin C. C. 76 (1830); *Gamlen*, 1 F. & F. 90 (1858). The jury should have been told that they could consider the applicant's drunken condition and that, if they thought that he feared *bonâ fide* that he was going to be attacked by the corporal, they should find him guilty of manslaughter, and not murder. In *Meade*, 1909, 1

K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 25 T. L. R. 359; 2 Cr. App. R. 54, there was no provocation, and the case is not applicable here. The effect of the summing up was that the jury, in view of the evidence, were forced to dismiss the question of drunkenness entirely from their minds. Moreover, the Judge in his summing up dealt with the question of the blow which, the applicant said, was struck him by a sergeant earlier in the day, as an isolated matter, whereas it should have been considered in conjunction with the applicant's drunken condition; and, again, in dealing with the evidence, he did not put before the jury the applicant's own evidence as giving support to his (the applicant's) story of provocation. It is submitted that the conviction should be superseded by one for manslaughter.

Marshall Hall, K.C. (*H. C. A. Bingley* with him) for the Crown: If any member of the Court thinks that it would have been open to the jury to have found a verdict of manslaughter, if a question had been put to them in regard to the applicant's evidence that the deceased man had approached him roughly and in a threatening manner, the Crown do not insist upon the conviction for murder.

The LORD CHIEF JUSTICE: If, in this case, there was any evidence that the deceased man approached the applicant in a rough manner, from which the applicant might infer that he was about to deal him a blow, it should have been brought to the attention of the jury by the judge in his summing up. It is clear that at the trial there was some confusion in regard to interpretation, and two interpreters were requisitioned to discover exactly what the applicant meant. It is difficult to know what happened. The Court has come to the conclusion that there is some ground for the contention that the question should have been left to the jury, whether they believed the applicant's statement that the deceased corporal approached him in a rough and threatening manner which indicated some intention on his part of being violent towards him, as distinguished from using violent language. Therefore, without going further, the Court considers that it would be justified in cancelling the verdict of murder and substituting for it one of manslaughter. There is just sufficient to enable the Court to act under s. 5 of the Criminal Appeal Act,

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1907, and to say that the jury must have been satisfied of facts which proved the applicant guilty of manslaughter. The Court can then reduce the verdict to one of manslaughter, and inflict on the applicant the sentence which it thinks fit. Although we alter the verdict, the matter is a very serious one. The only element of doubt in the case is whether or not there was anything which might have caused the applicant, in his drunken condition, to believe that he was going to be struck. The Court has come to the conclusion that the sentence which it passes upon him must be one of fifteen years' penal servitude.

Verdict substituted; sentence reduced.

G. B.

JOSEPH HAYNES.

Severity of sentence, when there is a remanet.

Appeal against sentence.

The appellant was convicted on March 3rd, 1917, by the Chairman at Middlesex Sessions, of shop-breaking (two convictions) and warehouse breaking, and was sentenced to two terms of four years' penal servitude consecutive, and one term of four years' penal servitude concurrent.

The appellant in person.

The Crown was not represented.

The LORD CHIEF JUSTICE: The appellant has a bad record. His age is 38, and he has been convicted for countinghouse or warehouse-breaking or thieving on five occasions, the last being in January, 1912, when he received two sentences of three years' concurrent and a further three years' consecutive. He earned his remission in respect of the last-named, and was released in June, 1916. He was employed at a printing works from July till October, when he joined the Army. He deserted, but was arrested and sent back to his unit. He deserted again shortly before Christmas, and was at liberty up to the time of his arrest for the offence with which the Court is dealing here. In view of

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the fact that he has a *remanet* of eighteen months from his last sentence, the Court thinks that the present sentence is too severe, and that it should be reduced to one of five years' penal servitude upon each indictment concurrent. He will, therefore, have to serve five years instead of eight, excluding the *remanet*.

Sentence reduced.

G. B.

The Court (consisting of the Lord Chief Justice and Ridley and Atkin JJ.) also sat on March 26.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE ROWLATT.

1917
2 *April.*

WILLIAM JAMES ROBINSON.

S. 9 of the Criminal Appeal Act, 1907, empowers the Court to hear evidence of facts which have occurred since the trial.

This was an application for leave to appeal against conviction. Appellant was convicted on the 7th March, 1917, at the Central Criminal Court, before Lord Coleridge J., of murder, and was sentenced to death.

Bryan (under s. 10 of the Criminal Appeal Act) for the appellant, who was present. The Crown have given notice that they intend to apply for leave to call further evidence.

[THE LORD CHIEF JUSTICE: That application should be made now.]

R. D. Muir (with him *Percival Clarke*) for the Crown. One of the grounds stated in the application for leave to appeal is that the verdict is against the weight of the evidence, and in those circumstances one question that will have to be considered is whether there has been any substantial miscarriage of justice. The evidence which I desire to call is to shew that the appellant, since his conviction, has written a letter from prison which has a material bearing on that issue. S. 9 of the Criminal Appeal Act provides that the Court of Criminal Appeal may, if they think it necessary or expedient in the interests of justice (*inter alia*), receive evidence and "exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters."

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WILLIAM JAMES ROBINSON.

Reading L.C.J. Avory J. Rowlatt J.

The power of the Court of Appeal to accept evidence in civil matters of events which have happened since the date of the trial is sufficiently shewn by O. 58, R. 4.

Bryan: I admit that the evidence in question is most material, but I submit that evidence of acts committed or statements made since the trial is inadmissible. If such evidence is given, it must be open to the appellant to give evidence himself, and call witnesses to deal with the point raised. It might thus amount to a re-trial.

The LORD CHIEF JUSTICE: We are of opinion that it is within the power of the Court to admit the evidence under those words in s. 9 of the Criminal Appeal Act on which Mr. Muir relies, which give this Court the same powers as the Court of Appeal possesses in civil matters. It is clear that the Court of Appeal in civil matters has power to admit evidence which would throw a material light on the issue. It is a power which must always be exercised with great care. As it is admitted that the evidence will throw a light on the matter in question, we have decided to admit it. The value of the evidence will be a matter for subsequent consideration.

George Coleman, called and examined by *Muir*, stated: I am a principal warder at Pentonville Prison. On the 9th March the appellant handed me a letter he had written. It is my duty to read such letters; I did so. It was addressed to Miss Harding, 15, Goldsmith's Buildings, Drury Lane, and signed "Bill." The type-written document produced is a copy of that letter to the best of my recollection.

Sir Ernley Blackwell stated: I am Assistant Under-Secretary of State for the Home Office. In the ordinary course of my duties I received a letter through the Prison Commissioners, addressed to Miss Harding and signed "Bill." I had a copy made. I then closed the original letter and had it posted.

Arthur Reginald Love stated: I am a clerk at the Home Office. On the 10th March I copied a letter on the instructions of the last witness. The document produced is the copy I made.

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Maggie Harding stated: I live at 15, Goldsmith Buildings. I know the appellant. I received a letter from him after his conviction. I burnt it. The document produced is a copy of that letter.

The letter was then admitted in evidence; in it the appellant stated that he was guilty of the crime, and was satisfied with his sentence; that the motive of the crime was not robbery, but that he had mistaken the deceased man for a man with whom he had had a row on the previous day.

Appellant, called and examined by *Bryan*, stated that the letter bore his signature, but that he had not any recollection of writing it; he was so much upset by the conviction that for two or three days he did not know what he was doing. He had had a row with a Colonial soldier the day before the murder, and had mistaken the deceased for the soldier in question.

Bryan: It is impossible for me now to argue, as I had intended, that the evidence was so contradictory that it would be unsafe to allow a conviction based on it to stand. Although the appellant admits the killing, it was not a planned murder, and was done without malice in the real sense of the word. I suggest that the proper verdict would be one of manslaughter.

The LORD CHIEF JUSTICE: The appellant was indicted for the murder of Alfred Williams, and was convicted. The deceased was a private in the Canadian Expeditionary Force, and was apparently coming out of a public-house at closing time on a Sunday night, when, according to the evidence, after moving a very short way towards a lamp-post he was struck with a knife by the appellant. He fell, and very soon expired. At the trial, which lasted a considerable time, there was a body of evidence which was subjected to very close analysis by counsel and by the judge. The defence raised was that the appellant was not there at the time; that he was forty yards away, and that a mistake had been made. The judge in summing up called the attention of the jury to the evidence in detail, and more particularly to the discrepancies in the evidence of the more important witnesses, and it appears to us that no fault can be found with the summing up.

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We gather that the argument which was to have been placed before us would not have been based on the summing up, but on the insufficiency of the evidence. Bearing in mind that it was dark at the place in question, that would have been an argument which it would have been proper for the Court to hear and consider, but after his conviction and pending this appeal, the appellant wrote a letter to Maggie Harding, which has been proved, and on which the appellant has given evidence. In that letter, and in the statement made by the appellant, it is admitted that he did the act. Apparently there was no question of any kind between him and the deceased, but he mistook him for a Colonial soldier with whom he had words on the day before. As the appellant now tells the Court that he struck the fatal blow with a knife, it is manifest that in these circumstances the crime is admitted, and his appeal cannot possibly succeed. In these circumstances we must refuse the application.

Application dismissed.

A. L. B. T.

(The Court, constituted as on April 2, also sat on April 3.)

[The Court (the Lord Chief Justice and Ridley and Rowlatt JJ.) sat on April 20th.]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE AVORY.

WILLIAM BIRCH CALEY.

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In reversing the verdict of a jury, the Court is greatly influenced by the fact that the evidence is as consistent with innocence as with guilt.

The appellant, William Birch Caley, who was convicted before Mr. Justice Coleridge, at the Central Criminal Court, of conspiracy, and on February 28th, after seven days' trial, was sentenced to eighteen months' imprisonment in the second division, appealed against conviction.

J. A. Hawke, K.C., and *J. A. C. Keeves* for the appellant, who was present. The appellant was convicted on an indictment which charged him, with four other persons, Mitchell, Brinkman, Shepherd and Dow, with conspiracy to defeat the provisions of the Military Service Acts, and, in a second count, with conspiracy corruptly to accept gifts contrary to the provisions of the Prevention of Corruption Act, 1906. Shepherd was acquitted, the others, like the appellant, being convicted. At the time of the alleged offence the appellant was a member of the Medical Board at the White City Recruiting Office, his duty being to examine recruits and classify them for the particular kind of service for which he considered them to be medically fit. Mitchell and Brinkman were chief clerks at the same Recruiting Depôt. Dow was a doctor practising at Willesden, who was alleged to have taken money

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from men of military age and to have given them medical certificates for production before the Recruiting Board, in which there were false statements. The conspiracy alleged by the prosecution was that Mitchell and Brinkman found men liable to military service who were willing to pay to evade that service; that the men were taken to Dr. Dow, who gave them false certificates, and that when they presented themselves before the Medical Board, Mitchell and Brinkman took care that they should go before the appellant, Dr. Caley, who, in furtherance of the common design, either reported to his superior officer (who alone had the power totally to reject recruits) that the men were unfit for service, or placed them in a low medical class (which he had power to do himself), which would have the effect of postponing their call-up for service for at least a considerable time. From beginning to end there was no evidence that Dr. Caley ever received a penny from anyone. Nor did he report to his superior officer that the men were unfit for military service: they were so classified by that officer. It is submitted, first, that there was no evidence against Dr. Caley to go to the jury at all, and, secondly, that if there was, the judge misdirected the jury in his summing up. He not only failed to distinguish between the cases of the different prisoners, which, in view of the length and difficulty of the trial, he should have been careful to do, but he failed to put the defence of any of the prisoners sufficiently to the jury. Further, he confused the charges contained in the two counts of the indictment. For these reasons the conviction should be quashed.

Travers Humphreys (and *Percival Clarke*) for the Crown: On the first point, there was sufficient evidence not only to justify the judge in submitting the case to the jury, but to support the verdict of the jury. Secondly, the summing up was sound. Even if it contained statements which were ambiguous and, if they stood alone, might have caused confusion in the minds of the jury, taken as a whole, it was irreproachable. The strongest piece of evidence against the appellant was the fact that the conspiracy could not have been successfully carried out without him.

The LORD CHIEF JUSTICE: The most important point for the consideration of the Court in this case is whether or not, taking

the case as a whole and having regard to its conduct and to the evidence, there is sufficient evidence to support the finding of the jury. If the Court comes to the conclusion that, although there was technically just sufficient evidence to warrant the judge in leaving the case to the jury, in view of the evidence and the circumstances of the trial, the verdict is unsatisfactory, following the usual practice and in accordance with the powers vested in it by the Criminal Appeal Act, 1907, it can quash the conviction. The difficulty with which the Crown was confronted throughout the case was that of adducing direct evidence that Dr. Caley was party to the conspiracy. There is no evidence that he received one penny of the money which was paid to Mitchell, and in which the other persons convicted shared. There was no direct evidence that he knew that the medical reports which he gave were false. There is no evidence of this matter which is not equally consistent with his innocence as with his guilt.

The charges against him were made in respect of the cases of five men, namely, Alexander, Lewisohn, King, Sauge, and Soden. Alexander and Lewisohn the appellant did not classify at all in low categories of service, and the two cases must be ignored. Counsel for the Crown has argued that although Dr. Caley did not classify them, he made a medical report to Dr. Cooper, his superior officer, on which Dr. Cooper must have acted in totally rejecting the men. As regards Alexander, every one now admits that he was not fit for active service, as he was lame. Moreover, in regard to both these cases, Dr. Cooper, who at the time of the trial was still acting as the chief of the White City Medical Board, and who must be assumed to have acted perfectly honestly, was never called by the prosecution, although the prosecution was distinctly challenged to put him into the box. There is therefore no evidence that Dr. Cooper did act in these cases upon the reports of the appellant. Further, if he did there is no evidence that the appellant wilfully made false reports. In regard to King, the prosecution proved that in January and in June, 1916, he had been passed as fit for general service, but on September 27th he was examined by Dr. Caley, and classified B 3 (clerical work abroad), on the ground that he was suffering from muscular rheumatism and arthritis. It is sufficient to say that the evidence establishes that King had concealed from the doctors who exam-

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ined him in January and in June that he had suffered from arthritis and that he had had a venereal disease. Dr. Caley, who noticed in the course of examination that King was making certain movements of the body in a stiff and unusual manner, interrogated him and learnt his medical history. A certificate of King's own doctor was then produced. The fact that other doctors disagreed with the appellant is equally consistent with innocence on his part as with guilt. The remaining two cases were those of detectives. If there really was such a conspiracy as is alleged one would expect to find that both Sauge and Soden had been placed in low medical categories. What we in fact find is that Sauge was passed for general service. That case negatives the conspiracy instead of proving it. Soden, who like the others had paid money to Mitchell, was examined in the ordinary way by Dr. Caley, and produced to him a certificate from Dr. Dow, who was admittedly a conspirator. The appellant reported that Soden was suffering from chronic synovitis, and classified him C2 (labour at home). It is admitted that Soden had in fact suffered in the past from synovitis, and there is evidence that during the examination by Dr. Caley he professed to suffer pain in his knee.

In no case did any of the money paid to Mitchell reach the hands of Dr. Caley. There was no doubt excellent evidence against Mitchell and against the others who accepted part of the money which Mitchell received, but in our view there was not sufficient evidence against Dr. Caley of having wilfully given false reports to justify the verdict of the jury. His conviction, therefore, must be quashed.

Conviction quashed.

Solicitors for Appellant—*Percy Robinson & Co.*

G. B.

GOODMAN ROSENSON.

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Reading
L.C.J.
Ridley J.
Avory J.

When a false pretence is alleged in a document, the interpretation thereof is not a matter of law for the Court but of fact for the jury.

When the pretence alleged is (in effect) that a genuine business is carried on, the jury may infer without any specific statements by witnesses that they parted with their money on the faith of such an inducement.

Proviso to s. 4 (1) of the Criminal Appeal Act applied.

Appeal against conviction.

The appellant, Goodman Rosenson, was convicted on March 24th, 1917, before the Recorder, at the Manchester Sessions, of obtaining money by false pretences, and was sentenced to fifteen months' imprisonment with hard labour. He now appealed against his conviction.

Roome for the appellant, who was not present: The alleged false pretences of making which the appellant was convicted were contained in a circular in these terms, which he caused to be distributed by post among the inhabitants of many industrial districts in all parts of the kingdom.

THE BIGGEST BARGAINS EVER OFFERED.
EXTRAORDINARY SALE
of a Magnificent Assortment of
Necessary and Useful Articles at Gift Prices
to all Taking Advantage of our Generous Offer.
Absolutely the Greatest and most Beneficial Bargain Offer ever made to the British Public.
100 Valuable and Substantial Lines to choose from. All to be had for the Nominal Price of 1/3 each only.

Never before have such valuable goods been offered by any firm for the exceedingly low sum of 1*s.* 3*d.* each.

Make your selection now and send your order at once. Every article perfect and sent post paid.

As it is an advertising offer, ONLY ONE article at 1*s.* 3*d.* will be sold to the same person, therefore each customer must not send more than 1*s.* 3*d.*

A marvellous and genuine offer to all.

Goods that are well worth from 7*s.* 11*d.* to 12*s.* 6*d.* each.

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The prosecution contended that the only possible construction that could be put on this circular was that the appellant represented that he was carrying on a system of advertising his business by offering to sell articles of the value of 7*s.* 11*d.* to 12*s.* 6*d.* to anyone who sent him 1*s.* 3*d.*, whereas he was really doing nothing of the kind, but fraudulently retained the money for his own purposes. The appellant's case was that the circular could also be interpreted as being merely an overture to be followed by another offer to anyone who sent 1*s.* 3*d.*, namely, that one of the specified articles would be sent to that person without further payment if he or she introduced four other persons who in their turn would pay 1*s.* 3*d.* each, and who, on similar conditions, would be offered an opportunity of obtaining the articles cheaply. It is submitted that both these interpretations are possible; that the appellant was, according to the construction which he placed on the circular, carrying on a genuine system of advertising by means of the circular—a system which is generally known as the "snowball" system of advertisement, and that the meaning of the document should have been left to the jury. The Recorder, however, took the view that the construction of the circular, being the construction of a written document, was a question of law for him, and not one of fact for the jury, and directed the jury that the interpretation contended for by the prosecution was correct. Assuming, however, that the construction contended for by the prosecution was right, none of the persons who had sent 1*s.* 3*d.* to the appellant stated specifically that they were induced to part with their money by the false pretences alleged. In these circumstances, it is submitted, the conviction cannot be allowed to stand.

Gibbons, K.C., and *Lindon Riley* for the Crown: There was only one meaning which could possibly be placed on the circular, and that was the one which was contended for by the prosecution. It is true that Taylor on Evidence, s. 42, says: "An exception to the general rule of law which intrusts the judge with the construction of all written documents arises where the writing forms the subject of an indictment or an action, and the guilt or innocence of the defendant depends upon the popular meaning of the language employed." Even if, therefore, the Recorder was wrong in not leaving the question of the meaning of the docu-

ment to the jury, the jury must have interpreted the document in the way in which he did, and consequently no miscarriage of justice occurred, and by s. 4 (1) of the Criminal Appeal Act, 1907, the Court will not interfere with the conviction. The jury separately and expressly found that the representations were fraudulent.

Roome replied.

The LORD CHIEF JUSTICE: The main question raised by this appeal is whether at the trial the case was properly left to the jury. In our opinion, the Recorder was wrong in directing the jury as a matter of law that on the interpretation of the circular there had been a false pretence. However strongly he held the view that the wording of the document amounted to a false pretence it should have been left to the jury to say whether the appellant had made the statements in the circular with the intent to lead persons to a belief which was false. But on careful consideration of the circular and the other documents in the case, it is impossible to conceive that the jury, if properly directed, would not have come to the same conclusion on this point as the Recorder came to as a matter of law. Counsel for the appellant has argued that the language of the circular is reasonably capable of a different interpretation. If we thought that that was so we should be in the difficulty that the jury had not had the matter properly put before them, and we should not be able to say what their decision, if they had been properly directed, would have been. But in this case, although the jury were not properly directed, the interpretation of the circular must be that which the Recorder adopted, and we therefore are of opinion that there has been no miscarriage of justice. There is nothing in the circular which would lead anyone to the belief that if he sent 1*s.* 3*d.* he would simply entitle himself to receive the terms of a new offer by which he could receive the specified articles at the low price which was announced; there is everything to lead a person to the belief that if he paid 1*s.* 3*d.* he would be entitled forthwith to one of those articles.

Counsel for the appellant also contended that none of the persons who sent money to the appellant stated in terms that he or she was misled into doing so by the belief that there was a

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genuine business being carried on. To that extent the argument is justified, but it is clear on the evidence that the persons who received the document stated that they paid their money on the faith of it. And if there is no doubt of the meaning of the document there is clearly no doubt what the persons who paid their money believed. Therefore, although we accept the elementary proposition that when a person is charged with false pretences it must be established that the person parting with the money was induced to do so as a consequence of the false pretence, there was evidence on which the jury could properly so find, and in the absence of any complaint in regard to the direction to the jury, the point fails.

In these circumstances the conviction must stand, and this appeal will be dismissed.

Appeal dismissed.

Solicitors for Appellant—*Lustgarten and Finklestone*, Manchester.

JOHN LOFTUS.

Severity of sentence of preventive detention.

Appeal against sentence.

The appellant, John Loftus, was convicted on March 22nd, 1917, before the Deputy-Chairman, at the London Sessions, of obtaining money by false pretences and of being a habitual criminal, and was sentenced to three years' penal servitude and ten years' preventive detention. He now appealed against his sentence.

The appellant in person.

Van Breda for the Crown.

RIDLEY, J.: The appellant has a bad record. Between 1900 and 1914 he was convicted on fifteen occasions of larceny, house-

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JOHN LOFTUS.
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breaking and similar offences, and received various sentences. There were also three summary convictions for drunkenness. In January, 1914, he was sentenced to three years' penal servitude and also to five years' preventive detention as a habitual criminal. After the outbreak of war he joined the Army, but deserted. On the occasion with which we have to deal in this case he was convicted of being a habitual criminal on the proof that he had previously been so convicted. In these circumstances nothing can be said against that conviction. In regard to the sentence on this part of the case, however, the Court think that it is rather too severe, and that it should be reduced to one of five years' preventive detention.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE LUSH.

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ROSE DOUBLEDAY.

When a defendant is not represented it is peculiarly the duty of the Court of trial to protect his interests.

Sentence reduced in view of questions which ought to have been put not being asked and of defective direction to the jury.

Proviso to s. 4 (1) *of the Criminal Appeal Act applied.*

This was an appeal against conviction and sentence, by leave of Sankey J. Appellant was convicted at the Cambridgeshire (Isle of Ely) Sessions on April 4th, 1917, of larceny, and was sentenced to three years' penal servitude.

Rowsell for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of stealing two leggings (not a pair) between 20th February, 1916, and 26th January, 1917. They were seen in the prosecutor's shop when he took stock on the former date, and found in the appellant's house on the latter date. The prosecutor said he had not sold them, but no evidence was given to shew they had not been sold by someone else employed at the shop. The appellant's husband and other people lived in the same house as her, so the fact of the leggings being found there did not necessarily point to her guilt.

The real charge was of receiving, and there was not a word of direction on it. There was not a vestige of evidence of actual larceny. She used to go to the shop.

The sentence was excessive. The appellant had four previous convictions, the longest of which was twelve months' imprisonment. Her last sentence, which was for six months, was on the 8th October, 1911. On the 24th October she was sent to an

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asylum, and released on the 17th April, 1912. At the present trial there were ten other indictments against her, which were not tried. These must have been taken into consideration against her. Counsel referred to *Morris*, 11 Cr. App. R. 43 (1914).

H. O. S. Ellis for the Crown.

The LORD CHIEF JUSTICE: The appellant was convicted of stealing two leggings, and was sentenced to three years' penal servitude. Mr. Rowsell has argued on her behalf that the conviction should be quashed, and, alternatively, that the sentence should be reduced. He has contended forcibly that the trial was not satisfactorily conducted. We think he has established that, but that is not sufficient; the question is whether there has been a miscarriage of justice. We think there is abundant evidence that the leggings were stolen; it is difficult to see how, on the evidence, the jury could have returned a different verdict. We cannot read the summing up without realising that as much care was not taken on behalf of the prisoner as if she had been defended; several questions were not put which would undoubtedly have been put by counsel on her behalf. We are not in any way blaming the counsel for the prosecution nor the Chairman, but it was desirable in such a case to keep in mind that no one was appearing for the appellant, and it was therefore the duty of the presiding judge to protect her interests so far as possible. Though minor criticisms can be made on the trial, there is not enough to induce us to quash the conviction. The evidence was thin, but we think on the facts sufficient.

As to the sentence, we have a difficulty in seeing how such a sentence could be imposed for the particular offence. There were indictments referring to other articles, and after some questions the appellant agreed to have these articles returned. That was not an admission of any theft; she had pleaded not guilty to those indictments, and ought to have been sentenced only for the particular offence of which she had been convicted. If it had been the first conviction the Court would have dealt leniently with her, but she had been previously convicted. It is said she has been in an asylum since her last sentence. No evidence on the point is before the Court, but we have had enquiries made, and find she was for six months in an asylum; the prison authorities

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sent her to an asylum within six days of her conviction It is important to note that there has been no conviction since October, 1911, and this Court has said on more than one occasion that it will have regard to such a lapse of time in fixing sentence. Some explanation was given by the police of what she was doing in those years, but it is not very satisfactory. In view of the preceding charges, we must treat it as a serious offence, but we reduce the sentence to one of twelve months' imprisonment with hard labour. Of course, the prison authorities are in the same position as before, and can send the appellant to an asylum if it seems proper.

Sentence reduced.

A. L. B. T.

WILLIAM HADDON.

Severity of sentence.

The Court discourages the infliction of penal servitude when no sentence of imprisonment has been previously passed.

This was an appeal against sentence, by leave of Sankey J. Appellant was convicted on April 3rd, 1917, at the Staffordshire Sessions, of obtaining money by false pretences, and was sentenced to five years' penal servitude.

J. Wylie for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant pleaded guilty to nine charges of obtaining money, amounting in all to £36 12*s.* 9*d.*, by false pretences. He had previously, in 1909, been convicted of an attempt to obtain money by false pretences and fined; that was his only other conviction. The evidence shewed that he sent catalogues to people, generally sub-postmasters, and when they sent him money with an order for goods, either no goods or inferior ones were sent.

Farrant for the Crown: The police said they had received many complaints, but as these came from people at a distance, and the amounts involved were small, there had been difficulty in getting anyone to prosecute. A police officer said in evidence:

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"No more unscrupulous scoundrel has come under the notice of the police in Staffordshire for some years." It is true that from 1898 to 1905 he had been employed by one firm, and since then by another firm until the present date.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to obtaining money by false pretences with intent to defraud, and was sentenced to five years' penal servitude. A number of cases were charged against him of obtaining money, ranging from 1*s.* to £10, by a circular and catalogue representing himself to be a wholesale stationer able to supply the goods mentioned in the catalogue. They were sent to small districts in remote parts of the country, which made it difficult to make good any complaint, and in the majority of cases, after receiving the money, he never sent the goods. It turns out that he is an undischarged bankrupt, and not a wholesale stationer, but in respectable employment as a traveller, which ought to have been enough to support him. The Court looks upon the case as a serious one. He was sentenced to five years' penal servitude, a very severe sentence when regard is had to the fact that he had never yet been in prison. His only offence hitherto was in 1909, when he was fined 40*s.* for attempting to obtain goods by false pretences. No conviction has been recorded against him since but for a trumpery matter which has no relevance to the present charge, and it seems to us that the sentence is too severe. Viewing all the facts, we have come to the conclusion that the sentence should be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE AVORY.

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JOHN HENRY GRAY.

Reference by the Home Secretary in view of fresh evidence.
Mere standing by when a crime is committed does not constitute that crime.

Appeal against conviction.

The appellant, John Henry Gray, was tried with one Robinson for murder, and was convicted, after a three days' trial, on March 7th, before Lord Coleridge J., at the Central Criminal Court, of manslaughter, and was sentenced to three years' penal servitude. He did not enter an appeal, but the case was now referred to the Court by the Home Secretary under s. 19 (a) of the Criminal Appeal Act, 1907.

R. M. Montgomery, K.C. (and *E. A. Swan*) for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was charged with a man named Robinson with the murder of a Canadian soldier named Williams, in Upper St. Martin's Lane, London, on the night of November 26th, 1916. Robinson was convicted of murder, and has since been executed, while Gray was convicted of manslaughter, and received the sentence stated above. Robinson appealed to the Court of Criminal Appeal against his conviction [above, p. 226, April 2nd], and a letter was then put in evidence by the Crown which Robinson had written shortly after his conviction to a girl friend, in which he confessed his guilt, and went on to state that the object of the crime was revenge, and not robbery, as had been suggested by the prosecution. On the night of the crime Gray and Robinson came into the "Sussex Arms," in Upper St. Martin's Lane,

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about ten minutes before closing time. Williams had been in the public-house for about one hour with another soldier named Martin. Both men had drawn sums of money the previous day, and had these sums on them when they entered the public-house. Martin left the "Sussex Arms," about 8 o'clock, with a woman on the night of the crime, but before going handed to Williams the greater part of his money for him to take care of. There was no suggestion that either Robinson or the appellant saw the transfer of the money. Everyone who was in the public-house left at closing time, and Williams, while standing on the pavement near a lamp post about forty yards up the Lane, was struck down and killed by a blow which, according to the medical testimony, must have been dealt by a knife, such as was found later in Robinson's possession. The appellant was close by when the tragedy occurred, and there was evidence that he had pushed the murdered man with his hand because he had annoyed a woman to whom he (appellant) was talking, and Robinson was then seen by one witness to strike the deceased. The case for the prosecution was that somehow Robinson and Gray had got to know of the money which was in Williams's possession, and that when the latter left the public-house an attack was made on him, being begun by Gray, who pushed him, and continued by Robinson, the object of the attack being to rob him of the money. All the notes were found intact in Williams's pockets. It is submitted that there was no evidence of any concert between the two men to rob Williams, and that it cannot be assumed that, if the jury had had before them the statement which Robinson afterwards made, namely, that the motive for the crime was revenge and not robbery, they would still have convicted the appellant. The judge, in summing up the case to the jury, based all possibility of the appellant's guilt on the existence of concert between him and Robinson to rob Williams. There was no evidence inconsistent with Robinson's statement after the trial that the motive for the crime was revenge. Further, it is difficult to see how the appellant could be guilty of manslaughter. On the evidence it would seem that he must be guilty of murder or nothing.

Muir (and *Percival Clarke*) for the Crown: If the jury had had before them any other reasonable suggestion of the motive

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JOHN HENRY GRAY.

Reading L.C.J.
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for the crime than that offered by the Crown, viz. robbery, it is highly probable that they would have acquitted the appellant. There was, however, very strong circumstantial evidence against him, although Mr. Swan submitted to the judge at the trial that there was not sufficient evidence to go to the jury that the accused men were working in concert. Even now it is impossible to say for certain what the motive for the crime was, and it must remain a matter of inference.

The LORD CHIEF JUSTICE: The Court has come to the conclusion (apart from Robinson's statement about the motive of the crime being revenge, and not robbery), that viewing the evidence in the case as a whole, there was here no satisfactory evidence of concert to rob Williams between the two men, Robinson and Gray, the appellant. Once that conclusion is reached, the whole fabric on which the case for the Crown is based falls to the ground. The case for the prosecution was that Robinson and the appellant had acted in concert to rob Williams at all hazards. If that had been proved the appellant, as well as Robinson, would have been guilty of murder. It is not necessary that a man, to be guilty of murder, should actually have taken part in a physical act in connection with the crime. If he has participated in the crime—that is to say, if he is a confederate—he is guilty, although he has no hand in striking the fatal blow. Equally it must be borne in mind that the mere fact of standing by when the act is committed is not sufficient. A man, to become amenable to the law, must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence. As we have come to the conclusion that there was no concerted attempt to rob Williams, it follows that there was no participation by Gray in the murder of Williams by Robinson. The result is that the conviction must be quashed.

Conviction quashed.

G. B.

WALTER WILLIAM CHADWICK, FREDERICK MATTHEWS, AND HARRY JOHNSON.

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Evidence of identification is weakened if the identifying witness has previously been shewn a photograph of the accused for the express purpose.

A jury is not entitled to disregard strong evidence of an alibi *except on stronger evidence.*

Appeals against conviction.

The appellants were convicted on April 5th, 1916, before the Chairman at the Coventry Quarter Sessions, of larceny, and were each sentenced to twelve months' imprisonment with hard labour. They now appealed against their convictions on the certificate of the Chairman.

Joy for the appellants, who were present: On February 16th, 1916, at about 2.45 p.m., the prosecutor, a gentleman of the name of Spencer, drew some £44 in notes and silver from his bank in Coventry. On leaving the bank he met a friend named Rivett, who walked with him to the Post Office, where he (Spencer) wished to despatch a telegram. The two persons parted outside the Post Office. Mr. Spencer said that as he went up the steps into the Post Office, carrying the money in a bag, he saw four men standing in a line on the top step, and that as he passed them one of them pressed against his bag as if to discover what it contained. He entered the Post Office and went to one of the desks provided for the writing of telegrams, placing his bag on the adjoining desk. He despatched his telegram and then missed his bag. He immediately raised the hue and cry, but the thieves were not discovered. Afterwards, both he and Rivett purported to identify the three appellants and a man named Chambers, who was charged with them and acquitted. It would seem, however, that this evidence of identification, when examined, is of little value. Before seeing the men both Spencer and Rivett were shewn a number of photographs by the police, among which were those of the appellants. The latter were obviously of more recent date than the other photographs exhibited, and were mounted in a different way. Even then both Spencer and Rivett made mistakes in regard to one of the men. Other evidence of identifica-

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tion which was relied on was the possession by one of the appellants of a damaged £1 note, which Spencer said he recognised as one which had been given him at the bank. But he obviously had little opportunity of looking at every one of the notes he received from the bank, and there are many damaged £1 notes in existence. Further, there was evidence that the appellants would have been able just to catch the 3.12 train to Sheffield, where they were the next morning, if they had committed the crime at the hour alleged by the prosecution, and the appellant, Matthews, was found to have in his possession a Coventry Station platform ticket, which was said to have been issued on February 16th, the suggestion being that he had taken a platform ticket to give him access to the platform whence he boarded the train and attempted to travel without paying the proper fare. But there was evidence that the machine from which these platform tickets were procured automatically was constantly out of order, and that the order of the tickets, which was the only fact relied on as determining the date of issue, might thus become disarranged. Further, although enquiry was made at the station within a short time after the robbery, no one had seen any men rushing for the train. It is submitted that the appellants made a complete answer to the case against them, and that they proved an unassailable *alibi*. The evidence shewed that they were arrested on the morning of February 17th at Sheffield for an offence under the Defence of the Realm Regulations. When charged with the robbery they admitted having been at Coventry on February 15th, but said that on that day they travelled to Nottingham, proceeding in the afternoon of the 16th to Sheffield, where Chambers and Matthews sent registered letters containing money to their wives, between 4 and 5 p.m. If they had been at Coventry at the time of the robbery they could not possibly have been in Sheffield by 5 o'clock. Their evidence of their presence at Nottingham was corroborated by trustworthy witnesses. Chambers was undoubtedly acquitted because the jury were satisfied that he was not present at the crime, and as the men were all found together next morning it would seem dangerous to convict the appellants merely because, as was the case, one witness could definitely swear to having seen Chambers in Nottingham, but refused to be certain in regard to the others.

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Eales for the Crown: The questions which were left to the jury at the trial were all questions of fact. The summing up of the Chairman was unexceptionable and, indeed, extremely in favour of the appellants. Despite this, the jury who had heard all the evidence and seen all the witnesses rejected the appellants' story and convicted them. The fact that Spencer and Rivett had seen photographs of the appellants and Chambers before actually identifying them weakens, but does not render valueless the evidence of identification of these two witnesses. The evidence of the appellants' *alibi* was not entirely satisfactory.

The LORD CHIEF JUSTICE: This is a singular case. The guilt or innocence of the appellants depends entirely on the effect of the evidence of identification. Both Mr. Spencer and Mr. Rivett identified the appellants as men who had been present at the time of the robbery, but they did so by means which are not so satisfactory as those usually resorted to by the police. Before seeing the men themselves they were shewn photographs of them, which were mounted on a form of card different from that on which other photographs, numbering about twelve, were exhibited. The photographs of the four men charged were on these cards because they had been taken by the Sheffield police, who used different cards from those employed by the Coventry police. Later, the appellants were identified in the usual way by being picked out from groups of other men, among whom they had been placed separately. It cannot be said that the evidence of identification was as satisfactory as if Mr. Spencer or Mr. Rivett had identified the men without having seen photographs, or photographs of this particular kind. In view of the explanation which has been given of the reason why the photographs were sent from Sheffield to Coventry (namely, that the police might know whether to detain the four men—whom they already had in custody—or not), it is clear that no blame attaches to the police in regard to the course which was pursued. The defence set up was that the appellants were at Nottingham on February 16th, having arrived there the night before, and evidence was called to support that defence. Against that evidence it is said that a Coventry station platform ticket was found on one of the appellants, which was stated by the railway officials to have

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been issued on February 16th, 1916. The evidence of that, however, is unsatisfactory. The ticket bore the date of January 17th, which was attributed to a defect in the automatic machine, which had been out of order on February 14th, and it seems clear that the machine was not working properly. The only reason for saying that it was issued on February 16th was that it was one of a series of tickets which should have been issued on that day, but in view of the state of the machine, it is impossible to rely on the order of the tickets always being preserved. The prosecution contended that this evidence shewed that the appellant, Matthews, who was found to be in possession of this platform ticket, was in Coventry on February 16th. It would be impossible to convict any man on such evidence. Further, both Spencer and Rivett were wrong in their identification of one of the men, and that man was Chambers, who, Mr. Spencer alleged, pressed against his bag, and whom he must have noticed particularly. That makes one doubt whether the evidence of these witnesses can be relied on in regard to the identification of the other three. Further, again, the Chairman who tried the case was so dissatisfied with the verdict that he gave a certificate of appeal to this Court to the effect that "the verdict of the jury was (a) unreasonable, and (b) not to be supported having regard to the evidence." In view of all the facts, this Court has come to the conclusion that the verdict of the jury should be set aside on the ground that it cannot be supported by the evidence, and that the convictions are unsatisfactory and must be quashed.

Convictions quashed.

Solicitors for the Appellants *Philip Baker & Co.*, Birmingham.

G. B.

JAMES GILLON.

1917
14 *May.*

In sentencing an incorrigible rogue regard should be had to the length of time since committal to prison.

Appeal against sentence.

The appellant, James Gillon, was convicted on January 5th, 1917, at the Padiham Petty Sessions, of being an incorrigible rogue, and on April 4th, 1917, at the Preston Quarter Sessions, was sentenced to twelve months' imprisonment with hard labour. He now appealed against his sentence.

The appellant was not represented and was not present.

The Crown was not represented.

RIDLEY J.: The appellant in this case was convicted on January 5th, 1917, at the Padiham Petty Sessions, of being an incorrigible rogue within the meaning of s. 5 of the Vagrancy Act, 1824, inasmuch as he had committed an "offence against this Act which subjected him . . . to be dealt with as a rogue and vagabond," he "having been at some former time adjudged so to be and duly convicted thereof." In accordance with the provisions of the section, he was committed to prison until the next quarter sessions, and kept to hard labour during the period of his imprisonment. On April 4th the justices in court of sessions, under s. 10 of the Act, sentenced him to a further imprisonment of twelve months with hard labour, and it is against that sentence that he now appeals. That sentence, which was the maximum sentence, might not have been excessive in itself, but it must be remembered that when it was passed the appellant had already been in prison for three months, and during that time had been performing hard labour. His case on appeal, as we understand it, is that during that period he has really been serving a sentence of punishment. In our view, that position ought to have been remembered by the Court of Quarter Sessions, and the sentence, therefore, will be reduced to one of nine months, as it was passed three months after the appellant was committed to prison.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRENCE, AND MR. JUSTICE SHEARMAN.

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24 *May.*

JOSIAH MORRIS ROBERTS.

An application for adjournment of a case likely to last some time should be notified to the Court some days before its sitting.

The appellant was convicted on May 4th, 1917, before Low J., at the Central Criminal Court, of conspiracy to defraud, and was sentenced to eighteen months' imprisonment with hard labour and to pay the costs of the prosecution. He now appealed against his conviction on law.

Maddocks (*Lewis Thomas, K.C.*, with him) for the appellant, who was present, applied for a postponement of the case on the ground that he had been unable to obtain the documents, which were very voluminous, till two days previously. He was totally unprepared to conduct the appeal.

[The LORD CHIEF JUSTICE: Why was this application not made before?]

Maddocks replied that he had been unable to make the application, as there had been no Court of Criminal Appeal to whom he could do so. He had held the opinion that such an application must be made to a Court of Criminal Appeal, and to no other court.

The appellant said that he had no objection to the postponement.

Sir A. Bodkin, for the Crown, said that he would leave the matter in the hands of the Court. The documents were numerous, and he himself had not had time fully to deal with them.

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The LORD CHIEF JUSTICE: As counsel for the appellant informs the Court that he is unprepared to conduct the case, this application will be granted. In all applications of this character, however, some notification should be given to the Court before the day on which the case is actually in the list. The authorities knew that this was a long case, and the list has been prepared accordingly. The result is that the greater part of the day will be wasted.

Application granted.

Solicitors for the Appellant—*Wright and Webb.*

ANTHONY THOMAS SPALDING.

Disclosure of information likely to be of use to the enemy is equally criminal whether the information be derived from confidential official sources or otherwise.

Sentence mitigated in view of absence of corrupt motive.

Appeal against sentence.

The appellant, Anthony Thomas Spalding, was convicted on April 27th, before Low J., at the Central Criminal Court, of collecting and communicating information contrary to Regulation 18 of the Defence of the Realm (Consolidation) Regulations, 1914, and was sentenced to three years' penal servitude. The trial was *in camera*. He now appealed against his sentence.

Brocklehurst for appellant, who was present: The grounds of appeal are that the appellant, previous to his conviction, bore a good character; that, admittedly, he acted for no wrong, corrupt or unworthy motive; that the information was conveyed to a personal friend of many years' standing as not for publication, and that there was no breach of the confidence reposed in him as an assistant press censor, since none of the information which he communicated was obtained by him in the course of the fulfilment of his duties in that position. As has been stated, the appellant was employed in the Press Bureau. He had an intimate friend who lived at St. Annes-on-Sea, and he wrote him a number

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ANTHONY THOMAS SPALDING.

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of letters containing information with respect to the movements of troops and other matters concerning which information is not, by Regulation 18 of the Defence of the Realm (Consolidation) Regulations, 1914, to be "collected, recorded, published or communicated." The terms of the Regulation are wide enough to include the collection and communication in any circumstances, however innocent, of the kinds of information specified. But what is contended in mitigation of the appellant's punishment is that he did not obtain the information which he communicated to his friend from material which came into his hands in the capacity of an employee in the Press Bureau. He obtained it, it is true, from conversation with his colleagues at the Bureau and at the Press Club, but his source of information was never any other than common journalistic gossip. When he wrote the letters he did not in any way realise the gravity of what he was doing.

Sir A. Bodkin for the Crown: It is agreed that there was no evidence of any sinister motive on the part of the appellant, or of the existence of any corrupt bargain between him and the gentleman to whom he communicated the information. The appellant's motive probably was to keep on good terms with and to impress with a sense of his importance a gentleman who from friendship had offered him hospitality. It must be pointed out that for the better administration of the department the persons employed in the different sections of the Press Bureau are directed to communicate with each other in regard to their work, so that the information obtained there by the appellant from his colleagues would not necessarily be gossip.

The LORD CHIEF JUSTICE: The appellant, Anthony Thomas Spalding, was charged under Regulation 18 of the Defence of the Realm (Consolidation) Regulations, 1914, on an indictment containing seventeen counts. He pleaded guilty to fifteen counts, and was sentenced to three years' penal servitude. His appeal is for reduction of the sentence. We have come to the conclusion that the first argument submitted by his counsel is no ground for reducing the sentence. We cannot draw the distinction between disclosure of information obtained from a perusal of documents at the Press Bureau and disclosure of in-

formation obtained from colleagues at the Press Bureau and imparted to the appellant either at the Press Bureau or elsewhere, which is contended for by counsel for the appellant. From the information which is before us it appears that it is right that there should be inter-communication of information between members of the different sections of the Press Bureau for the purpose of securing the proper administration of the department, and there seems to be no ground for suggesting that other members of the Press Bureau improperly or wrongly disclosed information or communicated information elsewhere or otherwise than they were entitled in the course of their employment.

The second ground put forward on behalf of the appellant is that he is a person who has hitherto borne an excellent character, who has been engaged in an honourable profession, and who did not realise the enormity of the offence which he was committing. The Court is bound to take into account the nature of the communications which he made. According to his own statement, he was appointed as one of three journalists representing the War Office in the censorship. He knew, as, indeed, any man of the meanest intelligence must have known, that he was not at liberty to disclose any information which he obtained during his employment in the censor's office. Nevertheless, he wrote long letters containing much information, the greater part, if not all, of which was calculated to be of use to the enemy if it came into his hands. That information was obtained either from documents which came before him at the Press Bureau or in the course of conversation with colleagues at the Press Bureau or elsewhere in reference, it seems to us, to his employment at the Press Bureau. It is essential that it should be realised that this is a grave offence. It constitutes a breach of the trust reposed in the appellant, which cannot be regarded otherwise than as serious. In his favour it is to be said that he did not disclose the information in question for gain. There is no ground whatever for suggesting that he acted corruptly. Indeed, it is admitted by the Crown that that was not the case. He did not commit the offences to which he pleaded guilty with the purpose of obtaining any ulterior advantage for himself. So far as it is possible for us to judge he acted from a desire to present himself as a person who was entrusted with secret information of the highest importance to the State, which he communicated to his friend, but

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24 *May.*

ANTHONY THOMAS SPALDING.

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not for publication. If he had paused to think he must have realised not only that his course of action was very wrong, but also that the information which he disclosed would not be kept secret. It was not even a statement made by a man on the spur of the moment to a friend whom he meets. Letters containing a series of statements of the utmost importance to the State, and of a character which would be of use to the enemy, were deliberately written. It is, therefore, impossible for the Court to regard the offence committed by the appellant as otherwise than a very serious one. The object of the punishment of the appellant is to deter other persons from committing similar offences, and to warn them of their gravity. A severe sentence must be inflicted, but we think that one of three years' penal servitude is too heavy. The decision of the Court is that the sentence of the appellant be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

Solicitor for the Appellant—*H. M. Bowden.*

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BAILHACHE, AND MR. JUSTICE SHEARMAN.

THOMAS EVANS,
ARTHUR FLINT (OTHERWISE GEO. McARTHUR).

1917
5 June.

On a charge of picking pockets evidence of suspicious conduct just before and in the same circumstances as the offence charged is admissible.

Appeals against conviction and sentence.

The appellants were convicted on April 8th, 1917, before the Chairman, at the Leicester County Quarter Sessions, of larceny from the person, and were each sentenced to three years' penal servitude. They now appealed against their convictions and sentences.

Joy for the appellants (under s. 10 of the Criminal Appeal Act, 1917), who were present. The appellants were convicted of stealing from the pocket of one Stephen Henry Adkin a purse containing six £1 Treasury notes, two 10*s.* Treasury notes, two half-sovereigns in gold and 7*s.* in silver at a sale at Langley Priory on March 6th, 1917. Evidence was given by the prosecutor to the effect that he had his purse when he lunched at 12 o'clock on that day. After lunch he went to the field where horses were being sold. There was a considerable crowd, and he noticed the appellant, Flint, pressing against him on two occasions. The appellant Evans also came to him and attempted to draw him into conversation. On returning home in the evening he missed his purse, and next day went to the police. On March 22nd and 29th he went to Loughborough and identified the appellants as the two men whom he had noticed at the sale. Other evidence was given to the effect that the appellants were "pushing among the crowd," and that Evans lifted a man's coat tail and put his hand in his pocket. When the evidence is

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June 5.

THOMAS EVANS, ARTHUR FLINT (OTHERWISE GEO. MCARTHUR).

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Shearman J.

analysed it would seem that the appellants, no doubt deservedly, got into an atmosphere of suspicion, and for that reason alone were convicted of the offence charged against them. It is submitted that there was no evidence directly connecting them with that particular offence. In the circumstances the jury should have been warned that the appellants must be convicted on specific evidence, and not by reason of general suspicion.

Disney, for the Crown, was not called on to argue.

SHEARMAN J.: In this case the jury believed the identification by the prosecutor of the appellants as the two men who, during the horse sale, pressed and pushed against him on more than one occasion. There is no evidence that his purse was then stolen. Subsequently, however, he found that he had lost his purse, and he immediately suspected the appellants. In the purse there were six £1 Treasury notes and two half-sovereigns, which are rarer now than some years ago. When Evans was arrested five £1 Treasury notes, one sovereign, two half-sovereigns, and other money was found on him. A constable gave evidence to the effect that on March 6th he was at Tong Station and saw the appellants alight from the train which came from Derby, and that they left the station to go in the direction of Langley Priory. Two other witnesses proved that they saw the appellants co-operating together in hustling persons at the horse sale, and in attempting to pick the pocket of some unidentified person. That goes to shew that the appellants were together at the sale, and that their hustling or pushing was in pursuance of a concerted plan, and was not merely accidental. For what it is worth, therefore, it is some evidence against them. But the important point was that both the appellants had an opportunity of giving evidence at the trial, and neither availed themselves of it. The summing up of the case to the jury was careful, and the Chairman told the jury that they must be satisfied that the appellants were the men who stole the purse. The jury were satisfied, and it is unnecessary for this Court to interfere with their verdict. In our view, also, the sentence is not too severe.

Appeals dismissed.

G. B.

NATHANIEL GRINBERG.

1917
6 *June.*

Darling J.
Bailhache J.
Shearman J.

On a charge of receiving stolen property the onus *never shifts to the defendant.*

Appeal against conviction.

The appellant was convicted on May 4th, 1917, before Mr. Commissioner Rentoul, at the Central Criminal Court, of shop-breaking and stealing and receiving certain property, and was sentenced to twelve months' imprisonment with hard labour, and was recommended for expulsion.

The appellant in person.

Arthur Bryan for the Crown.

Darling J.: In this case the Court is of opinion that there was plenty of evidence to justify the conviction, and we should not think of interfering with the verdict of the jury, which was thoroughly justified by the facts. The only question on which we have had any discussion among ourselves was in regard to a passage in the learned Commissioner's summing up. In explaining to the jury the doctrine of *onus* of proof in these cases he said: "Now, gentlemen, it is the duty of the prosecution to prove their case, of course. Suppose these prisoners had come here and said: 'We will say nothing. Let the prosecution prove the case against us if they can, and we will defy them to do it, and we will not say a single word.' They would have been quite within their rights in so doing, and the prosecution would have had to prove with regard to this crime that the stolen goods were in their possession. The burden would have been on the prosecution, but after the prosecution had gone so far, then the burden shifts to the prisoners, and they have then to explain as best they can how these goods were in their possession, and if they fail to explain that, then, of course, the jury may presume that they had guilty knowledge. But half-way through the burden of proof is entirely on the prosecution. Then it shifts ——" Mr. Bryan, who appeared for the Crown, then interposed and said: "My Lord, it has been held by the Court of Criminal Appeal that it does not really shift. It had been suggested previously that the burden did shift, that it was then for the prisoners to prove that they came innocently by the stolen property, but

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the ruling is that if persons are found in possession of stolen goods they are expected to give a reasonable account how they became possessed of them—one which the jury might think fair. If the jury think it fair then they ought to acquit, but the burden does not actually shift." The Commissioner at first undoubtedly did not lay down the law in accordance with the rules which have been given in this Court. But after Mr. Bryan had interposed, as he quite properly did, the Commissioner said: "I suppose that the phrase 'the burden shifts' is too strong, but it is a nice distinction which I do not understand. Well, the burden never shifts, but it does." I may, perhaps, say, with all humility, that I do not understand that. The Commissioner continues: "That is right, is it not? If the burden never shifts the burden all the way through is on the prosecution. That is laid down by the Court of Criminal Appeal. At the same time if they [the prisoners] give no explanation at all of how they were in possession of goods recently stolen one would wonder what chance they would have with a jury. . . . Each case is to be taken by itself." In our opinion, although the Commissioner did not at first state the law as it has been stated in this Court, it was properly expressed by Mr. Bryan, and the Commissioner accepted it. There does not seem to be any actual difficulty in understanding the rule. It really comes to this. In the first place it is for the prosecution to prove their case against the prisoner. If such a case is proved as in the absence of some explanation by the prisoner would be conclusive against him, it is only reasonable that he should provide the jury with some ground for acquitting him. That has been called "giving a reasonable explanation how the prisoner comes to be in possession of the stolen property." If the prisoner gives that explanation it is still for the prosecution to satisfy the jury that he is guilty, and in that sense the burden of proof is always on the prosecution. It is never so shifted on to the prisoner that the prosecution has a right to say: "If the prisoner does not prove himself innocent he ought to be convicted." To the very last it is for the prosecution to prove that the prisoner is guilty. That is the rule, and it admits of ready understanding. For the reasons I have already stated, however, this appeal must be dismissed.

Appeal dismissed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE AVORY.

ARTHUR THOMPSON.

1917
18 *June.*

When the issue is of identity on the defence of an alibi, *evidence of anything found in the possession of defendant when arrested is admissible if it tends to prove that the thing in question promotes the alleged criminal design or is of a kind usually employed by those who commit the offence in question.*

Evidence of anything found on the defendant when arrested which may be connected with the offence alleged may be given ; à fortiori *when the defence is an* alibi.

The proper course when a point on admissibility of evidence involving discussion of facts which may, in the opinion of the judge, be prejudicial to the defendant is to be argued, is (not for counsel to argue it privately before the judge but) for the jury to retire to their room.

The Court has no power, after dismissing an appeal, to admit appellant to bail until the Attorney-General decides whether he will grant his fiat to appeal to the House of Lords.

This was an appeal against conviction on matters of law and an application for leave to appeal against sentence. Appellant was convicted at the Central Criminal Court on the 18th May, 1917, before A. T. Lawrence J., of gross indecency with a male person and of assault on a police officer; he was sentenced to nine months' imprisonment with hard labour on each charge, the sentences to run concurrently.

Gill, K.C. (with him *Sir A. Bodkin, Huntly Jenkins* and *E. J. Purchase*), for the appellant, who was present. The main ground of appeal in this case is that evidence was admitted for the prosecution of the finding in a locked drawer in the appellant's rooms of a number of photographs of boys, most of them in a nude state. According to the evidence the attention of two boys, Maunders and Jones, was attracted by the appellant on the 16th March, and at his

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suggestion they went into a urinal, where the indecent acts took place. The appellant was arrested three days later, being then pointed out to the police by one of the boys; it was after his arrest that the photographs were found. Jones also said he had seen the appellant on the 13th February, and two other boys were called who said they were with Jones on that occasion and saw the appellant then. When the appellant was asked by the magistrate whether he wished to say anything, he said, "I am not guilty, and I never set eyes on the boys until I saw them in Court," so the issue was clearly defined at the earliest possible moment as one of identity, and this was the only defence put forward at the trial. Owing to the difficulty of discussing the question of the admissibility of the evidence in question in the hearing of the jury, the judge saw counsel for the Crown and me in his private room, where the point was discussed. Afterwards the objection was taken in Court in such a way that the details of the evidence were not disclosed. The judge said that the evidence was admissible as possibly tending to corroborate the identification of the appellant by the boys. In his summing up he said that the photographs were not strictly speaking indecent photographs, but they were not artistic in his judgment; that it was a curious thing, if the boys were mistaken, that a man should appear on the scene who had a powder puff in his pocket (this evidence, I submit, was also inadmissible), and these photographs in his rooms.

The principle to be applied in deciding whether such evidence is admissible dates back to 1720. The matter was considered in *Bond,* 1906, 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633, where every case in point is touched upon, and Darling J. in his judgment in that case quoted the following passage from Foster's Crown Law, Discourse I. p. 246: "The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life."

[THE LORD CHIEF JUSTICE: If the evidence tendered is merely to shew that the person accused is of evil disposition it is clearly irrelevant. If it shews that the act for which he is indicted has

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18 *June.*

ARTHUR THOMPSON.

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been committed it is clearly admissible. See the argument in *Ball*, 1911, A. C. 47, at p. 64; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 29 T. L. R. 162; 6 Cr. App. R. 31.]

See also the judgment of Lord Campbell C.J. in *Oddy*, 2 Den. C.C. 264 (1851). It was in consequence of that case that the Prevention of Crimes Act, 1871, s. 19 (34 & 35 Vict. c. 112), was passed, which makes admissible evidence of other stolen property found in accused's house in cases of receiving. That being the principle there is no difficulty in the application if one asks what was the real issue in this case; there was here no question of guilty knowledge raised.

[AVORY J.: The question whether any man committed the offence was an issue. Such evidence may be given to rebut any defence which may be raised: *Makin* v. *Attorney-General of New South Wales*, 1894, A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C.C. 704; 58 J. P. 148.]

That was qualified by Darling J. in his judgment in *Bond*, and that question was further considered in *Perkins* v. *Jeffery*, 1915, 2 K. B. 702; 84 L. J. K. B. 1554; 113 L. T. 456; 79 J. P. 425; 31 T. L. R. 444, where Avory J. delivered the judgment of the Court. The rule is well expressed in Stephen's Digest of the Law of Evidence, Art. 10: "A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto and not by reason of its being connected therewith in any of the ways specified in articles 3—9 both inclusive, is deemed not to be relevant to such fact except in the cases specially excepted in this chapter." If this evidence is admissible evidence that the appellant had been seen committing similar offences with other boys must also be admissible. In a case of burglary evidence that burglar's tools were found in the accused's house would not be relevant unless connected with the crime in some way, *e.g.*, by evidence that entrance to the house broken into was effected by similar tools. In *Mackenzie and Higginson*, 75 J. P. 159; 27 T. L. R. 152; 6 Cr. App. R. 64 (1910), the evidence in question was relevant having regard to the defence raised. The appellant said in the witness-box that he bought the photographs in Rome, Florence and Sicily; he was then cross-examined with regard to other photographs in

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a manner which was clearly directed to character, and was intended to suggest that he was a man of unnatural inclinations.

[THE LORD CHIEF JUSTICE: If the evidence was admissible the cross-examination was permissible. The defence was set up that the photographs had been bought for artistic purposes.]

The cross-examination was not in accordance with s. 1 (f) of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36). The cases on the subject were further reviewed in *Rodley,* 1913, 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 465; 23 Cox C. C. 574; 58 S. J. 51; 29 T. L. R. 700; 9 Cr. App. R. 69. In *Perkins* v. *Jeffery* the evidence objected to was rendered admissible by the cross-examination of the witnesses for the prosecution. The evidence of the powder puff was also not relevant; no attempt was made to shew that the appellant used it for the commission of the offence. He gave evidence of an alibi on both the 16th March and the 13th February, each of which was supported by independent evidence, but in the face of the prejudice created by the evidence of the photographs it was hopeless to expect a jury to acquit.

Sir Frederick Smith, A.-G. (with him *Travers Humphreys* and *Branson*), for the Crown. The evidence was admissible as there was the necessary nexus between it and the crime. The instance given of a burglar's outfit being found in the house of a man charged with burglary is on all-fours with this case, and such evidence would be clearly admissible. *Mackenzie and Higginson* is indistinguishable; there was no evidence there that the articles in question were ever shewn to the prosecutrix. These photographs could only have been intended to corrupt the minds of the boys; they could only have been collected by a man of perverse instincts. The boys attended on the 19th March by appointment; the appellant did not speak to them as he was with other men; they followed him and he finally gave them two shillings; he said he gave them the first coin he could find to get rid of them, but it is the same sum as was paid to them on the 16th March. The argument against the admissibility of the evidence is substantially the same as was put forward unsuccessfully in *Makin* v. *Attorney-General of New South Wales. Perkins* v. *Jeffery* is also in favour of the contention of the Crown.

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Sir A. Bodkin in reply: The contention put forward by the Crown, if accepted, will introduce a complete novelty in the law of evidence in criminal cases. There is no authority for the general proposition that if a person is found in possession of property, evidence of possession of such property is necessarily admissible. There was no question of the appellant's state of mind or intent here, and the only object of the evidence must have been to shew that he was of bad moral character. Oral evidence of appellant's immoral character, or of a tendency to such acts as those charged would not be admissible. Logically, if these photographs are admissible, evidence of bad moral character, and of previous conviction of a similar offence would be admissible, although the issue of character had not been raised. *Perkins* v. *Jeffery* is distinguishable. If the photographs had been shewn to the boys, or if there had been any evidence of an intention to use them to debauch the boys, it would be more difficult to say that there was no nexus. In *Hull*, [1902] Queensland Reports 1, it was held that letters written to a person charged with obtaining money by false pretences, shewing that he had been engaged in a long-continued scheme of fraud of the same character and found in his possession, were rightly admitted in evidence to prove criminal intent. But letters written to him found in his possession tending to shew that he was a man of bad character, and not connecting him with any such scheme, were held to be inadmissible. These photographs come within the second branch of that case.

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The written judgment of the Court was delivered by the Lord Chief Justice:

The appellant was convicted of committing acts of gross indecency with two boys, and also of assaulting a police-constable.

He appeals against the conviction on the grounds that: (a) the judge wrongly admitted evidence which was not relevant to any of the offences charged in the indictment; and (b) the judge misdirected the jury by telling them that they might take this evidence into consideration. If the evidence was admissible, no complaint can be made of the direction to the jury; therefore the sole question in this appeal is whether this evidence was or was not admissible.

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It was not disputed at the trial or on this appeal that the offences had been committed with the boys. The defence was that the appellant was not the person who committed them, and that he was elsewhere on the day and at the time in question.

For the prosecution there was a body of evidence identifying the appellant. One boy had seen him and spoken to him about a month before, both boys identified him as the man who on the 16th March did the acts complained of, and gave them money and told them to meet him again on the Monday, the 19th March. Both boys went on the Monday to the appointed place, and saw the appellant, who was accompanied by two other persons. He told the boys he had business that day, and had no time, that they were to go away, and that the tall man was a policeman. He gave one boy two shillings to divide with the other. The police, who had been informed of the events of 16th March, and were present to watch on the 19th March, then intervened. The boys thereupon told their story in the presence of the appellant, who made no reply, but struck the police officer and endeavoured to run away.

At the trial the appellant and other witnesses gave evidence on his behalf to establish an *alibi* on the 16th March. It was not in dispute that he saw and spoke to the boys on the 19th March. His story was that on this day he saw the boys following him, that he went into a shop and saw them again as he left it, and that he then told them to go away, gave them a coin out of his pocket without looking at it, and told them to buy soap and get their faces washed. At the police court he said he was not guilty and had never set eyes on the boys before his arrest.

During the course of the trial evidence was tendered by the prosecution to prove that, when the appellant was arrested on the 19th March, two powder puffs were found upon him, and that in a drawer in one of the rooms where he lived photographs of boys were found, including twelve separate photographs and ten pasted in an album, of naked boys in various attitudes. Objection was raised to the admissibility of this evidence on the ground that none of these articles was connected with any charge on the indictment, and that the evidence could only serve to prove that the appellant was a person of evil character or disposition with regard to boys, and therefore was a person likely to commit the offence. After argument the learned judge admitted the evidence

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as tending to corroborate the evidence of identification of the appellant. The appellant by his evidence sought to explain that these photographs had come into his possession for the purpose of artistic study, that he had spent nine months in Italy studying sculpture, and had acquired most of the photographs there. Having regard to the verdict of the jury and the examination by the Court of the photographs we must take it that these photographs are not of an innocent but are of an objectionable character.

There is no doubt of the principles of law applicable to this case; they are well settled and in recent years have been frequently discussed and approved, and notably by the Judicial Committee of the Privy Council in *Makin* v. *Attorney-General for New South Wales* [above], and by the House of Lords in *Rex* v. *Ball* [above]. The general rule is that the evidence tendered must be relevant to the charge for which the accused is being tried. If the evidence *merely* proves, or tends to prove, that the accused is of such evil character or disposition that he is likely to have committed the offence charged against him, it is irrelevant and is inadmissible. If it tends to prove that the accused committed the crime charged against him, it is relevant and admissible, notwithstanding that incidentally it may also prove, or tend to prove, that the accused is a person of criminal or immoral character or disposition: *Rex* v. *Ollis*, 1900, 2 Q. B. 758, per Channell J., 781—782; 69 L. J. Q. B. 918; 64 J. P. 518; 19 Cox C. C. 554; 83 L. T. 251; C. C. R., and *Perkins* v. *Jeffery* [above]. The difficulty lies in the application of this general rule to particular cases.

The question to be decided is whether, as contended by the prosecution, this evidence relating to the powder puffs and photographs tends to prove that the appellant was the person who committed the offences charged in the indictment, or whether, as contended by the defence, it merely shews that the appellant was a person whose character and disposition render it likely that he committed the offences. It is well known to those who have experience of these cases that persons who commit abominable crimes or acts of gross indecency with male persons make use of appliances such as powder and powder puffs and implements such as objectionable pictures for the purpose of carrying out their designs, and where the issue is whether the accused is the person who committed such acts evidence that there are found in his

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possession, either on his person or in the rooms occupied by him, at or about the time of the alleged offence, appliances or implements of that description is relevant to that issue, because it proves that he is a person in possession of the means by which such crimes are usually committed. It cannot, in our view, be doubted that, when upon trial for burglary there is evidence connecting the accused with the commission of the crime, and the defence is that the accused was elsewhere at the material time, and had no part in the crime, evidence of the possession of housebreaking implements, either upon him or at his house at about the time when the offence was perpetrated, is admissible. Just as upon a trial for procuring abortion, when there is evidence of a similar character against the accused, and a similar defence is raised, evidence is admissible to prove the possession by the accused of instruments or drugs which may be used for the purpose of procuring abortion, although no particular appliance, implement, instrument or drug can be identified as having been used on the particular occasion.

The powder puffs were actually found upon him when he was arrested on the 19th March. It is in evidence that he had made an appointment to meet the boys on that day for the purpose of repeating the acts of the 16th March charged against him; if these are articles used by persons who commit these acts, the evidence is admissible, because it tends to shew that the man upon whom the articles were found on the 19th March was the same man who had met the boys on the 16th March. Ordinary men do not walk about carrying powder puffs in their pockets. The man who committed the acts of 16th March was a man who would be likely to carry powder puffs. The man who, according to the evidence, came to meet the boys on the 19th for the same purpose, in fact carried powder puffs in his pocket. This evidence tends to prove that the man arrested on the 19th was the man who did the acts on the 16th, and is relevant. Of course, evidence would not necessarily be admissible of everything found in the possession of the accused. For instance, if a burglarious implement was found upon him, it could not be given in evidence against him upon a charge of committing acts of gross indecency; it would have no relevance to the issue, and would merely tend to shew that he was a person of bad character. But upon a trial for burglary, the finding of a burglarious implement upon him

would clearly be evidence against him, and, *à fortiori*, when the only issue is whether he is the person who committed the burglary.

The evidence of the possession by the appellant of the photographs in a drawer in his room raises a more difficult problem. It is contended by the appellant that even if the Court rules that the evidence as to the powder puffs was admissible, there is no nexus between the finding of the photographs in a drawer in the appellant's room on the 19th March and the commission of the offence on the 16th March. But the process of reasoning about the powder puffs equally applies to the photographs and leads to the same conclusion. The issue is of the identity of the appellant; the question is whether the possession of the photographs tends to connect the appellant with the commission of the offences charged. Ordinary men do not keep indecent photographs of naked boys in their possession. Men who commit the offences charged do keep such photographs in their possession as part of the appliances or implements used in carrying out their designs. The man who did the acts on the 16th March was a man who would be likely to have such photographs in his possession. The man arrested on the 19th in fact had such photographs in his possession at his rooms. This evidence is, in our judgment, relevant to the issue of identity, because it tends to shew that the man arrested on the 19th was the man who committed the acts charged on the 16th March.

We are of opinion that the finding of the photographs did tend to prove that the appellant was the guilty person, and this appeal must therefore be dismissed.

Upon the hearing of this appeal it was stated at the Bar that the learned judge received counsel in the case at their request in his private room, and there heard the argument on the admissibility of this evidence, because it was thought so prejudicial to the defence that the jury should hear the discussion. After the argument was concluded, the Court resumed its sitting, and the objection to the admissibility was formally taken in open Court without discussion, and the learned judge ruled that it was admissible. No objection was taken upon this appeal to the procedure adopted, but in order to prevent any misapprehension as to this Court's view of the proper course to pursue in such circumstances, we are of opinion that whenever the judge in his discretion thinks it will unfairly prejudice the defence if the

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argument should be heard in the presence of the jury, he should direct the jury to retire to their room, and he should hear the argument in open Court so that it may appear on the shorthand note. This course should only be adopted when the judge in the exercise of his discretion thinks that the defence would be unfairly prejudiced, and the question cannot be argued in the abstract, as it frequently may be, when the evidence objected to appears on the depositions.

Appeal dismissed.

Bodkin. It is proposed to apply to the Attorney-General for a certificate to enable this appeal to be carried to the House of Lords. I suggest, therefore, that the formal effect of this judgment be postponed until the next sitting of the Court, and the appellant's bail enlarged; application will be made in the meantime to the Attorney-General. An alternative course would be to release the appellant under the inherent power of the Court until the decision of the Attorney-General is known.

[DARLING J.: That would be ordering imprisonment to commence at a future time, which the Court has no power to do.]

A possible hardship may result if the Court has no power to release the appellant. The cases in which appeals to the House of Lords have occurred have been from decisions quashing convictions, except *Leach*, 7 C. A. R. 157, who was in custody from time of arrest and made no application for bail pending appeal.

The Court refused the application.

Solicitor for Appellant—*Harry Wilson.*

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CHARLES RUSSELL.

If on the allegation of being a habitual criminal it is proposed to give evidence of warrants issued against defendant for offences of which he was suspected, notice must be given.

The appellant was convicted on May 15, 1917, before the Chairman, at the Surrey Sessions, of larceny in a dwelling-house, and of being a habitual criminal, and was sentenced to five years' penal servitude and five years' preventive detention. He now appealed against the latter sentence and applied for leave to appeal against his conviction as a habitual criminal.

F. O. Robinson for the appellant, who was present (under s. 10 of the Criminal Appeal Act, 1907). The appellant was convicted on an indictment charging him with larceny in a dwelling-house on December 13, 1916. A charge of being a habitual criminal was inserted in the indictment. When the appellant came to be tried on that charge a number of matters, of which he had not received the notice prescribed by s. 10 (4) of the Prevention of Crimes Act, 1908, and of which, it is submitted, no evidence should in any case have been given, were stated by the police witnesses. Evidence was actually given of warrants being issued against him for offences of which he was in fact charged. In his summing up the Chairman did not accurately direct the jury on their functions in dealing with a case of this nature, and the effect of the summing up as a whole was unfair to the appellant.

He referred to *Mitchell*, 7 Cr. App. R. 283; 108 L. T. 224; 76 J. P. 423; 23 Cox C. C. 284; 28 T. L. R. 484 (1912); *Sullivan*, 9 Cr. App. R. 201; 83 L. J. K. B. 298; 110 L. T. 127; 24 Cox C. C. 13; 30 T. L. R. 94 (1913); and *Young*, 9 Cr. App. R. 185; 109 L. T. 753; 78 J. P. 80; 23 Cox C. C. 624; 58 S. J. 100; 30 T. L. R. 69 (1913).

G. Temple Martin for the Crown. It is submitted that the summing up of the Chairman was fair. There was no evidence given at the trial to which exception can be taken. It all went to the appellant's career as a whole. It was admissible as evidence of character and repute and was not a statutory ground of which notice was necessary under the Act. The ground in *Sullivan*

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[above] was statutory, *i.e.*, that he had been previously convicted as a habitual criminal and the conviction quashed: that case is distinguishable from this. He offered no account how he had spent the interval since his last conviction.

THE LORD CHIEF JUSTICE: The appellant was convicted of larceny in a dwelling-house, and was sentenced to five years' penal servitude. He was then tried on a charge of being a habitual criminal, found guilty, and sentenced to five years' preventive detention. It is unnecessary to deal with the first-named conviction. It is clear that it must stand, and that the sentence passed in respect of it cannot be interfered with. But it has been argued that the trial of the appellant on the charge of being an habitual criminal was unsatisfactory, and that the conviction must be quashed. The facts of the case differ somewhat from the cases which have come before this Court. The appellant's conviction as a habitual criminal cannot be upheld unless it is established that he was "leading persistently a dishonest or criminal life," not in the past, but at the time of the conviction. S. 10 (4) of the Prevention of Crimes Act, 1908, provides that notice shall be given when it is intended to insert in the bill of indictment a charge of being a habitual criminal, and of leading persistently a dishonest or criminal life, and the grounds for the charge must be set out. It is a condition precedent to a conviction as a habitual criminal that the accused, since attaining the age of sixteen years, has at least three times previously to the conviction of the crime which formed the main charge in the indictment been convicted of a crime. That condition is fulfilled in this case. Notice was given that the appellant, having been discharged from prison in November, 1914, on December 13, 1916, committed the crime for which he was at the time of the notice awaiting trial. No question can arise in regard to that. Then the notice proceeds:—"That subsequent to December 13, 1916, when you were last released from custody a warrant was issued for your apprehension on a charge of having stolen jewellery from a dwelling-house at Beaconsfield, in Buckinghamshire, on January 25, 1917." Those are the only grounds of which notice was given. In evidence it was proved, not only that this warrant had been issued, but also that other warrants had been issued against the appellant during the period between November, 1914, and

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December, 1916, in respect of offences alleged to have been committed by the appellant, but of all of which he was in fact acquitted; that a number of similar robberies had been committed during that time, and that, since the appellant's arrest, no such robberies had come to the knowledge of the police. The only relevance which that evidence presumably could have had was to shew that the appellant had committed those offences. It may be said to be evidence of character and repute, but to any contention that it was admissible on those grounds the answer is that no notice of it had been given to the appellant. When he came to the trial he had no indication that matters of this general import were to be charged against him. The position, therefore, is that evidence was given against the appellant of which notice had not been given to him, and consequently he may not have been prepared, and there is no direction in the Chairman's summing up that the jury should disregard that evidence. In these circumstances we do not consider that the conviction as a habitual criminal was satisfactory. This Court has pointed out again and again that great care must be exercised in the direction of juries on these charges, because Parliament has by the Prevention of Crimes Act, 1908, enacted that the jury that has convicted an accused person of a crime shall proceed to try him on the further charge of being a habitual criminal. In those circumstances care must be taken to see that the jury are not unfairly prejudiced against the accused. For the reasons which I have mentioned we have come to the conclusion that this conviction must be quashed.

Conviction as habitual criminal quashed.

G. B.

ELIZABETH PERFECT.

The fact that the trial judge is doubtful of the verdict (and grants a certificate of appeal) is not conclusive in the Court of Appeal.

The appellant was convicted on June 2, 1917, before Mr. Justice Horridge, at the Norfolk Assizes, of uttering a letter demanding money with menaces, and was sentenced to six months' imprison-

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ELIZABETH PERFECT.

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ment with hard labour. She now appealed against her conviction on the certificate of the trial judge.

Leighton for the appellant, who was not present (under s. 10 of the Criminal Appeal Act, 1907). The ground of this appeal is solely that the verdict of the jury was unreasonable. It cannot be said that there was no evidence on which the jury could convict the appellant. But in view of the inconsistencies of the prosecutor's story, and the manner in which he contradicted himself, it was impossible for the jury reasonably to have convicted the appellant. This view is supported by the certificate of the trial judge, which is as follows:—

> "I think the verdict was quite wrong, although there may be a difficulty in interfering where the jury have seen both the principal witnesses, and had believed the prosecutor. However, I should like the case to be considered by the Court of Criminal Appeal."

If the Court is of opinion that there is a well-founded fear of a miscarriage of justice, it will quash the conviction.

H. Claughton Scott was not called on to reply.

THE LORD CHIEF JUSTICE: This appeal comes before us on the certificate of the judge who presided at the trial of the appellant, and it has been urged that there has been a miscarriage of justice, and that the verdict is so unreasonable that it should not stand. We cannot agree. Counsel for the appellant does not allege, and cannot allege, that there has been any misdirection of the jury; that any evidence was wrongly admitted; or that there was no evidence on which the jury could convict the appellant. The summing up was in fact very favourable to the accused. It is obvious that the judge wished the jury to acquit her. The questions in issue at the trial were purely questions of fact, and were, therefore, for the determination of the jury, and not for that of the judge. Unless we, sitting in this Court, are prepared to say that, when a judge differs from a jury on a finding of fact, we ought to conclude that the verdict is unreasonable, or that there has been a miscarriage of justice, we cannot quash this conviction. Substantially, the only evidence given was that of the

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prosecutor and that of the appellant. It was for the jury to say which they believed, and to decide accordingly, bearing in mind that a doubtful case must result in a verdict of acquittal. In these circumstances it seems to us that we must accept the decision of the jury on the facts, and that we are not in a position to quash this conviction, unless we substitute ourselves as a tribunal of fact when we do not have, as had the jury, the opportunity of hearing and seeing the witnesses. Therefore, this appeal must be dismissed. I think that I ought to add that it is obvious from the wording of his certificate that Mr. Justice Horridge took the same view of the functions of this Court as we have expressed.

Appeal dismissed.

G. B.

WILLIAM EDWARD SECOMBE.

Except in the clearest case, there must be a direction to the jury on a charge of obtaining by false pretences that an intent to defraud must be proved before they can convict.

The appellant was convicted on June 2, 1917, before the Chairman, at the Middlesex Sessions, of obtaining money by false pretences, with intent to defraud, and was sentenced to six months' imprisonment in the second division. He now appealed against his conviction and sentence.

The appellant in person.

H. D. Kendal-Grimston for the Crown.

THE LORD CHIEF JUSTICE: The facts of this case are simple. The appellant had been friendly with a Mr. Simpson, to whom he had from time to time lent money. Being in want of money himself he applied to Mr. Simpson for a loan of £10. Simpson told him to go to his (Simpson's) solicitor, who whould give him the money, and, if he could not get it there, to go to his (Simpson's) mother. The appellant went to Mrs. Simpson and obtained £2 from her after getting £10 from the solicitor. That

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£2 is the sum which he is said to have obtained by false pretences. It is elementary that, to constitute the commission of the offence with which the appellant was charged, intent to defraud must be shewn. It is true that there are cases in which it is so apparent that the money was obtained with fraudulent intent that the absence of a direction on the point is not fatal. But here it is obvious that the existence of the intent to defraud was a very important matter, because the appellant said that he obtained the £2 from Mrs. Simpson as a loan and intended to repay it. If that was true there could be no conviction, even though he had told her an untrue story by which she was induced to lend him the money. The Chairman, in directing the jury, omitted to tell them that, before they could convict the appellant, they must be satisfied that he had intended to defraud Mrs. Simpson. It was vital in this case that the jury should have the point in their minds, and the result of the omission of adequate direction on it must result in the quashing of the conviction.

Conviction quashed.

G. B.

The Court, consisting of the Lord Chief Justice, Darling and Avory JJ., also sat on July 2nd.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LAWRENCE, AND MR. JUSTICE ATKIN.

THOMAS MALKIN.

1917
16 *July.*

Severity of sentence mitigated in view of the trial judge's report and of the interval since a previous conviction.

Appeal against sentence.

The appellant, Thomas Malkin, was convicted on July 15th, 1917, before Mr. Justice Lush, at the Leicestershire Assizes, of larceny, and was sentenced to four years' penal servitude.

The appellant in person.

The Crown was not represented.

THE LORD CHIEF JUSTICE: We are of opinion that this sentence is too severe. The appellant was convicted for the larceny of three bicycles, and was sentenced to four years' penal servitude. There is no doubt that he and another young man stole the bicycles, and that there is a considerable series of convictions against him. It must, however, be said in his favour that for some eighteen months from the time of his last release from prison he has been working honestly, and appears to have been trying to get his living by proper means. That must be taken into consideration. We have also had the advantage of a report from the trial judge, who makes some observations for our consideration on the question of sentence. On the whole we have come to the conclusion that the sentence is too heavy, and that it should be reduced to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE ATKIN.

1917
26 *July*.

ARTHUR THOMPSON.

Huntly Jenkins for the appellant, who was not present. The applicant appealed to this Court against his conviction for gross indecency with a male person, and on the 9th July the Court gave judgment dismissing his appeal (see above, p. 261). The Attorney-General has now granted a certificate under s. 1 (6) of the Criminal Appeal Act enabling the appellant to appeal to the House of Lords; my application is that he should be granted bail pending the hearing of that appeal. There is, I submit, inherent power in any judge of the High Court to grant bail in such a case, and s. 14 (2) of the Criminal Appeal Act provides that "The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal." Thompson is still an appellant and his appeal is still pending.

The Crown was not represented.

THE LORD CHIEF JUSTICE: The Court will grant bail pending the hearing of the appeal in the amounts stated in the application, and with the two persons named in the application as sureties. They must enter into their bail before the Master of the Crown Office, and the appellant at Brixton Prison. The appellant must surrender to this Court if he receives notice to do so from the prosecution. If his appeal succeeds there will be no necessity for notice to be given.

Application granted.

Solicitor for the Applicant—*Harry Wilson.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE ATKIN.

HENRY CAMP.

1917
23 *July.*

Severity of sentence.

Appeal against sentence.

The appellant, on June 19th, 1917, before the Recorder at the Central Criminal Court, pleaded guilty to a charge of malicious wounding, and was sentenced to five years' penal servitude.

The appellant in person.

The Crown was not represented.

RIDLEY J.: It appears from the evidence which was given in the Court below that, without any provocation or warning, the appellant violently assaulted a policeman in a street at Walthamstow, knocking him down and cutting through his helmet by a blow at his head with a knife while he was lying on the ground. It was a dangerous and unprovoked assault. The appellant pleaded guilty to a charge of unlawful wounding. The Recorder in passing sentence on him alluded to the appellant's career, which is, no doubt, an important matter for consideration. In 1894 he was convicted at Calcutta, where he was serving in the Army, for striking his superior officer; in 1905, at Hong Kong, for being drunk on duty; in 1900, at Dublin, for violence to his superior officer, for which he was sentenced to five years' penal servitude; and in 1905, at Enfield, for assaulting the police. There were three convictions in London between 1906 and 1911 for larceny, housebreaking and warehousebreaking, and in 1913 he was convicted under the Prevention of Crimes Act. The most serious fact against him in the present case is the conviction in

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Ridley J.

1900. The appellant suggested in evidence that his head had suffered from exposure to the sun while he was serving with the Army in India, and also stated that he had been thrown from a horse. The sentence which has been passed on him is the maximum for the offence to which he pleaded guilty, and we think that it is rather extreme. It is true that he has been convicted on the previous occasions to which I have referred, and that the assault in this case was very violent, but in view of his statement and of the fact that there seems to be no reason for this unprovoked assault, we think that his offence would be adequately punished by a sentence of three years' penal servitude.

Sentence reduced.

G. B.

ERNEST WARDMAN WILBOURNE.

On a charge of rape, evidence of "instant" or "early" complaint is not excluded because the complaint is made to one person on the invitation of another or because it is not the first complaint.

Appeal against conviction on a point of law.

The appellant, Ernest Wardman Wilbourne, was convicted on June 27th and 28th, 1917, at Nottingham Assizes, before Lush J., of rape, and was sentenced to three years' penal servitude.

Hollis Walker, K.C. (*Joy* with him) for the appellant. The appellant was a medical practitioner, and the girl whom he has been convicted of outraging, Alma Beatrice Jones, was a patient at the Mansfield Dispensary, where she went periodically to be treated for tuberculosis. Her story was that on February 26th she called at the infirmary for some medicine. It turned out that she had made a mistake, and that it was not a day for interviewing patients. The appellant, however, was there, and said that he would give her some medicine. He took her upstairs to the second floor of the building, where there were examination and dressing rooms. There was no one else in the building, and the prosecutrix said that the appellant forced her on to a bench and

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raped her. That occurred between 5.30 and 5.45 p.m. As soon as she could the prosecutrix left the dispensary and began to walk home. She met her sister Grace, who asked her the question, "What is the matter with you?" Objection was taken to the admissibility of the answer to this question. Lush J. did not admit the evidence. Evidence was, however, given by the mother of the prosecutrix to the effect that when her two daughters returned home about 7 p.m., she noticed that Alma had been crying. Her two sons were present, but they left within 10 or 15 minutes. Grace then said to Alma, "You want to tell your mother all about it." The mother said: "Why, whatever has been going off?" Alma said: "Why, that doctor has insulted me." The mother: "What has he been doing to you?" Alma: "It is not what he has said, but what he has done;" and then told her mother the story which she had related in the witness-box. It is submitted that that evidence of the mother was inadmissible. The statement made by the girl to her mother was not a voluntary one, but was given as the result of inducement from her sister. It was not made as the result of a question by the mother, and in that way is distinguishable from *Norcott*, 1917, 1 K. B. 347; 86 L. J. K. B. 78; 116 L. T. 576; 81 J. P. 123; 12 Cr. App. R. 166. In *Osborne*, 1905, 1 K. B. 551; 74 L. J. K. B. 311; 92 L. T. 393; 69 J. P. 189, the question which gave rise to the complaint, viz., "Why have you not waited for us?" was quite unconnected with and in no way suggestive of the commission of any criminal offence, but the circumstances here are quite different. Moreover, it is submitted that evidence of complaint can only be given by the first person to whom the complaint is made. It is not possible to give evidence of a series of complaints.

Counsel also contended that the summing-up was inaccurate and did not adequately put the case for the defence.

McCurdy, for the Crown, was not called on.

THE LORD CHIEF JUSTICE: This appeal is based on the ground of the reception of inadmissible evidence, namely, the evidence of the mother of the complaint made to her by her daughter, Alma Jones. It is only necessary to say that reference to the cases of *Osborne* and *Norcott* (above) shews that they do not indicate that

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the evidence was not admissible. It may very well be that there is a point at which the narration by an outraged girl to other persons of what happened ought to stop. But in this case, putting it at the highest, the complaint to the mother was made very little more than an hour after the offence. Whether or not that is an "instant complaint" depends largely on what meaning is given to the word "instant." The judgments in those authorities shew that such evidence is admissible, not as evidence of the truth of the girl's statement, but as evidence of consistent conduct on her part. We cannot see any reason why the evidence should not be admitted. It can only be suggested that it was not admissible because the girl's sister, with whom she walked home, invited her to make it. It does not follow from what occurred that the complaint was not voluntary. In our view the point fails, and the conviction of the appellant must be affirmed.

Appeal dismissed.

G. B.

Solicitors for the Appellant—*Torr & Co.*, for Arthur Barlow & Son, Nottingham.

DAVID COOK IMRIE.

The evidence of a deaf witness unable to express himself intelligently which cannot be faithfully interpreted must be excluded altogether.

Appeal against conviction on certificate.

The appellant, David Cook Imrie, was convicted on July 5th, at the Durham Assizes, before Lord Coleridge J., of rape, and was sentenced to twelve months' imprisonment without hard labour.

Simey for appellant (under s. 10 of the Criminal Appeal Act, 1907). The charge against the appellant was that he had committed a rape against one Ethel Craggs, a married woman, of 24 or 25 years of age. Mrs. Craggs had been deaf from childhood, and was unable to speak intelligibly. She was able to make herself understood to her friends and relations. When she

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gave her evidence at the trial an interpreter was found to be necessary. Her aunt, who was a witness for the prosecution, acted in this capacity, and the result was extremely unsatisfactory. She shewed bias against the appellant, and, although, perhaps, unintentionally, it became obvious that she was not repeating to the Court the actual evidence given by the witness. At any rate, she could not make the witness understand the perfectly simple questions I put in cross-examination. In the end I had to abandon my cross-examination. In those circumstances it is submitted that the appellant's trial was so unsatisfactory that his conviction must be quashed. This contention is borne out by the certificate of the trial judge.

Luck for the Crown. I agree with what has been said by counsel for the appellant. It was absolutely impossible for the story of the prosecutrix to be tested by cross-examination. I do not dispute that the verdict was unsatisfactory.

THE LORD CHIEF JUSTICE: In view of the facts which have been laid before us we must quash this conviction. It is apparent that Mrs. Craggs was not able to understand the questions which were put to her through her aunt, who acted as interpreter. It is also clear that the aunt could not understand the answers given by Mrs. Craggs. Indeed, no one was in a position to understand the evidence, except some parts of it. In the view of the trial judge the verdict of the jury was unsatisfactory. We have had the advantage of a clear and frank statement by counsel who appeared for the prosecution, to the same effect. Without going into further details, therefore, the conviction must be quashed.

Conviction quashed.

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GEORGE ENSTON.

Sentence mitigated in view of the fact that defendant has a remanet to serve.

This was an appeal against sentence by leave of the full Court. Appellant was convicted, at the Reading Assizes, on the 27th May, 1916, before Bray J., of feloniously receiving stolen property, and was sentenced to three years' penal servitude.

Appellant in person.

The Crown was not represented.

The Lord Chief Justice: The appellant was indicted for housebreaking, larceny, and receiving stolen property; he pleaded guilty to receiving, and was sentenced to three years' penal servitude. The learned judge was under the impression that there was no *remanet* for the appellant to serve. It turns out that that was not correct, and that some mistake was made. The appeal is out of time, for the conviction was in May, 1916. The Court does not extend the time for appealing in the absence of special circumstances. The special circumstances put forward here are that the appellant has only just discovered that he has a *remanet* of over a year to serve. We think that the discovery of that fact is sufficient to justify us in allowing him to appeal. Bray J. informs us that he would not have passed a sentence of penal servitude if he had known it would involve the appellant serving over a year in addition. He has had severe sentences in the past, including one of ten years' penal servitude. The judge states that if he had known the true facts he would have passed a sentence of eighteen months' imprisonment with hard labour. We think that we ought to give effect to that view, and therefore we reduce the sentence accordingly.

Sentence reduced.

A. L. B. T.

ERNEST GREEN.

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Severity of sentence.

This was an appeal against sentence by leave of Low J. Appellant was convicted, at the Nottinghamshire Sessions, on the 2nd July, 1917, of housebreaking, and was sentenced to two years' imprisonment with hard labour.

Appellant in person.

The Crown was not represented.

RIDLEY J.: The appellant was indicted for housebreaking; at the time there were other charges against him than that to which he pleaded guilty, but his only previous conviction was at Sheffield in September, 1913, when he received fourteen days' imprisonment with hard labour for stealing a pork pie. He has been in the Army, and has not a good character there, but except for offences against the Army his only previous conviction is the one I have mentioned. The Chairman in passing sentence laid emphasis on the appellant's character in the Army, which no doubt must be considered, but the Court thinks the sentence excessive when there has only been one previous conviction of a trifling character, and therefore reduces it to twelve months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

SYDNEY BEE AND FRANCIS WILLIAM PEARCE.

Youths should not be sent to a Borstal Institution if there is a probability that they will not be able to get the full benefit of the training there.

These were appeals against sentence by leave of Low J. Appellants were convicted, at the Essex Sessions, on the 6th July, 1917, of larceny, and were each sentenced to three years' detention in a Borstal Institution.

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SYDNEY BEE AND FRANCIS WILLIAM PEARCE.

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Appellants in person.

The Crown was not represented.

ATKIN J.: These two boys were convicted of the larceny of two bottles of mineral water and some chocolate. They were sentenced to three years' detention in a Borstal Institution. They are both nearly eighteen years old, and were both convicted, at different times, in 1915 of stealing, and were bound over. No doubt the court of quarter sessions was anxious to do what was best for the boys; at the same time we think in the circumstances it is not satisfactory to send them to a Borstal Institution where they will not get the full benefit of the training, as the expectation of the court of quarter sessions was that they would be released at an early date to go into the Army. They were arrested on the 4th June, so they have been imprisoned already for six weeks. We think it will be sufficient now if they are each bound over in the sum of £5 for twelve months.

Sentences reduced.

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